Ellington v Consolidated Edison, Inc.

2008 NY Slip Op 32055(U)

July 16, 2008

Supreme Court, New York County

Docket Number: 0114712/2007

Judge: Carol R. Edmead

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SCANNED ON 7/18/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Ellington, Rebecca B.

INDEX NO. 114712/07

MOTION DATE 6/2/08

- v -

MOTION SEQ. NO. 001

Consolidated Edison

MOTION CAL. NO. _____

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with annexed Memorandum Decision, it is hereby

ORDERED that the motion by Empire City Subway (Limited) to dismiss the Amended Complaint is denied; and it is further

ORDERED that the cross-motion by D & S Restoration, Inc. to dismiss the Amended Complaint is denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff for an order (1) declaring the amended Summons and Complaint deemed filed *nunc pro tunc* as though it were filed at the same time as the initial summons and complaint; (2) excusing the misnomer of naming Empire City Subway Company (Limited) as Empire City Subway and permitting amendment of same *nunc pro tunc* and deeming the amended summons filed at the same time as the initial summons and complaint or allowing same to be considered as such *nunc pro tunc*; (3) that service of the amended Summons and Complaint establishes personal and subject matter jurisdiction over all defendants since the Amended Summons and Complaint was served within the 120 day period set forth in CPLR 306(b), that it was timely, satisfying the statute of limitations, and that since the Amended Summons and Complaint was filed and served prior to the time for service of an answer, leave of the court to amend was not required, and the filing date of the amended

Dated: _____ _____

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

summons and complaint relates back to the original summons and complaint; (4) declaring that plaintiff's Amended Summons and Complaint did not involve the addition of a new party, but the minor irregularity of a misnomer that was correct by amendment, and thus, dismiss Empire City Subway's motion; (5) that the Amended Summons and Complaint relates back to the original filing of the initial summons and complaint pursuant to CPLR § 203(f) and that the original pleading gave appropriate notice to all defendants named in the amended summons and complaint, and D&S's cross-motion should be dismissed as the Amended Summons and Complaint was filed and served within the Statute of Limitations; (6) that leave of the Court is not required to amend the summons and complaint and even if it was it is being granted herein *nunc pro tunc* as there is no prejudice to any defendant; (7) declaring that defendant must answer within 20 days of the court's order or plaintiff can move for default judgment; and (8) that defendants were in no way prejudiced by the amendment of the Summons and Complaint is granted; and it is further

ORDERED that the branch of the cross-motion by plaintiff for an order granting amendment of the Summons and Complaint *nunc pro tunc* or allowing an extension of time pursuant to CPLR 306(b) to serve the original Summons and Complaint and thereafter allowing an amendment as the Court is allowed to extend the time even without good cause shown, even though there is in the instant matter, in the interest of justice is denied as moot; and it is further

ORDERED that defendant shall serve an answer within 20 days of service of this order and notice of entry; and it is further

ORDERED that plaintiff 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.

FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated 7/16/08 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

REBECCA B. ELLINGTON,

Plaintiff,

Index No. 114712-2007

-against-

CONSOLIDATED EDISON, INC., EMPIRE CITY COMPANY (LIMITED),WARREN GEORGE, INC., MITCHELL CONSTRUCTION CORP., GREEN ISLE CONTRACTING OF BELLEROSE INC. and D & S RESTORATION, INC.,

Defendants.

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FILED
JUL 18 2008
COUNTY CLERK'S OFFICE
NEW YORK

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Empire City Subway Company (Limited) ("Empire City Subway Limited") moves pursuant to CPLR § 3211(a)(2), (a)(5) and (a)(8) to dismiss the Amended Complaint and any and all cross-claims against it on the grounds that the applicable three-year Statute of Limitations has expired and plaintiff, Rebecca B. Ellington ("plaintiff"), failed to obtain timely personal jurisdiction over Empire City Subway.

Factual Background

Plaintiff initially commenced this action against defendants Consolidated Edison, Inc., Empire City Subway, Warren George Incorporated, Mitchell Construction Co., Green Isle Contracting, Inc. and D & S Restoration, Inc. ("D&S") (collectively, "defendants") by filing the summons and complaint on November 1, 2007.

Plaintiff later filed an Amended Summons and Complaint on February 25, 2008, in which Empire City Subway was substituted by Empire City Subway Limited as a party to this action

(the "Amended Complaint").[1]

In this action, plaintiff alleges that on November 1, 2004, she tripped and fell on a raised and uneven portion of the sidewalk located on the south side of 68th Street, between Lexington and Park Avenue, in Manhattan, New York (Amended Complaint ¶¶44, 48). Plaintiff alleges that defendants negligently permitted said sidewalk to remain in an unsafe and dangerous condition and caused and created the sidewalk to be raised, uneven, and separated (Amended Complaint ¶¶47, 49).

Motion by Empire City Subway Limited

In support of its motion to dismiss, Empire City Subway Limited contends that the three-year Statute of Limitations for plaintiff's tort action under CPLR § 214 expired on November 1, 2007. Therefore, plaintiff's filing of the Amended Complaint on February 25, 2008 was outside the applicable three-year Statute of Limitations.

Moreover, plaintiff amended the Complaint well after 30 days of filing the initial Complaint. No stipulation to amend the complaint to add Empire City Subway Limited was signed or filed. Nor was any motion to amend the Complaint filed. Thus, the Amended Complaint, filed without leave of the Court and without a stipulation signed by all the parties, is a nullity and is void *ab initio*.

As such, the instant Amended Complaint filed after the Statute of Limitations is untimely, and does not create personal jurisdiction over Empire City Subway Limited as it violates CPLR § 214. Since personal jurisdiction was not timely obtained by plaintiff over Empire City Subway Limited, the Amended Complaint and all cross claims must be dismissed.

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[1] Green Isle Contracting, Inc. was also substituted by Green Isle Contracting of Bellrose Inc.

Cross-Motion by Defendant D&S

Likewise, D&S cross-moves pursuant to CPLR "3211(a)" to dismiss the Amended Complaint and all cross claims, also on the grounds that the applicable three-year Statute of Limitations has expired and that plaintiff failed to obtain jurisdiction over D&S within such period. D&S contends that it received an Amended Summons and Complaint, bearing a stamp by the New York County Clerk's office dated February 25, 2008. According to D&S, it appears that the Amended Complaint was filed more than three years after the date of the alleged accident, and therefore, the action against D&S is time-barred under CPLR § 214.

D&S further argues that plaintiff will not be able to establish a *prima facie* case of negligence against D&S. In support, D&S submits an affidavit from its President, Bogban Joldzic, wherein he states that the area in which plaintiff fell was not an area that was owned, operated, maintained or repaired by D&S.[2] D&S contends that it had no obligation under caselaw or statutory law to maintain the area where plaintiff's accident occurred. Since plaintiff cannot establish the essential elements of a negligence claim against D&S, *i.e.*, a duty to maintain the area, or failure to maintain an area, plaintiff's Amended Complaint must be dismissed.

Plaintiff's Opposition and Cross-Motion

In opposition, plaintiff contends that her cause of action arose on November 1, 2004, when she sustained her injuries, and that plaintiff filed the Summons and Complaint on November 1, 2007. "Empire City Subway" was named as a defendant in the action, based on a list of permits plaintiff obtained from the New York City Department of Transportation

[2] The Court notes that the affidavit is unsigned. D&S contends that it will submit an original affidavit on the return date.

("DOT"). The list of permits showed that a permit was issued by DOT to "Empire City Subway" not "Empire City Subway Company (Limited)" to work in the area where plaintiff fell, prior to her fall. Thus, plaintiff initially sued Empire City Subway. Empire City Subway made no effort to correct the name and identified itself as such. However, when plaintiff attempted to serve Empire City Subway, the Secretary of the State of New York rejected the service and was told that the company's official name was "Empire City Subway Company (Limited)". Therefore, plaintiff filed the Amended Complaint reflecting Empire City Subway Company (Limited) on February 25, 2008 and served same upon the Secretary of State within the 120-day period pursuant to CPLR § 306(b). It is settled law that as long as service is made within the 120-period, the service relates back to the filing. The amendment did not constitute a new filing for purposes of the Statute of Limitations. Accordingly, plaintiff obtained timely jurisdiction over Empire City Subway Limited. Even if Empire City Subway Limited claimed that the amendment constitutes the addition of a new party, then Empire City Subway failed to properly plead same by failing to set forth that it is proceeding under CPLR 1003, and the motion to dismiss should be dismissed on this ground alone.

Plaintiff's Amended Complaint did not add Empire City Subway Limited as a new defendant, but merely corrected a minor technical irregularity by adding "Company (Limited)". Such minor technical irregularity should be disregarded, and an amendment should be permitted. Additionally, as Empire City Subway Limited created the confusion, it should not be allowed to escape liability for a misnomer it created. Empire City Subway Limited has made no complaint nor presented any evidence that it was in any way prejudiced by the misnomer.

Further, courts have granted extensions of time where the Statute of Limitations would

otherwise bar a claim when no prejudice was found. And, had plaintiff served the initial complaint, plaintiff could have moved at any time to correct the mislabeling, *nunc pro tunc*, pursuant to CPLR § 305(c), even after the Statute of Limitations had run.

Although plaintiff did not request leave to amend the Complaint pursuant to CPLR 3025(c), the time for Empire City Subway Limited to respond had not commenced and therefore, had not expired, and service of the Amended Summons and Complaint was timely since it was made within 120 days of filing of the original Summons and Complaint.

For the same reasons, plaintiff argues that it obtained timely jurisdiction over D&S, which is named exactly the same in both the initial and Amended Complaint. As to D&S's motion to dismiss, plaintiff argues that D&S has raised no argument that it has been prejudiced by the amendment of the summons and complaint. The initial Complaint gave timely notice to D&S.

As to D&S's motion for summary judgment, such motion is premature. No discovery or depositions have been conducted, and D&S predicates its motion on an unsigned and unsworn affidavit. Additionally, plaintiff submits a copy of a permit, which shows that D&S was working in the area where plaintiff fell, prior to her fall. D&S has not sustained the burden for summary judgment and plaintiff has raised triable issues of fact as to whether D&S is responsible for the defect that caused plaintiff's injuries. Therefore, D&S's motion should be "dismissed in its entirety" as premature, unsupported with any factual proof and contradicted by documentary evidence.

Based on the above, plaintiff cross moves for an order (1) declaring the Amended Summons and Complaint deemed filed *nunc pro tunc* as though it were filed at the same time as

the initial Summons and Complaint; (2) excusing the misnomer of naming Empire City Subway Company (Limited) as Empire City Subway and permitting amendment of same *nunc pro tunc* and deeming the amended Summons filed at the same time as the initial Summons and Complaint or allowing same to be considered as such *nunc pro tunc*; (3) that service of the Amended Summons and Complaint establishes personal and subject matter jurisdiction over all defendants since the Amended Summons and Complaint was served within the 120 day period set forth in CPLR 306(b), that it was timely, satisfying the Statute of Limitations, and that since the Amended Summons and Complaint was filed and served prior to the time for service of an answer, leave of the court to amend was not required, and the filing date of the amended summons and complaint relates back to the original summons and complaint; (4) declaring that plaintiff's amended summons and complaint did not involve the addition of a new party, but the minor irregularity of a misnomer that was corrected by amendment, and thus, dismiss Empire City Subway's motion; (5) that the Amended Summons and Complaint relates back to the original filing of the initial Summons and Complaint pursuant to CPLR § 203(f) and that the original pleading gave appropriate notice to all defendants named in the Amended Summons and Complaint, and D&S's cross-motion should be dismissed as the Amended Summons and Complaint was filed and served within the Statute of Limitations; (6) granting amendment of the summons and complaint *nunc pro tunc* or allowing an extension of time pursuant to CPLR § 306(b) to serve the original Summons and Complaint and thereafter allowing an amendment as the Court is allowed to extend the time even without good cause shown, even though there is in the instant matter, in the interest of justice; (7) that leave of the Court is not required to amend the summons and complaint and even if it was it is being granted herein *nunc pro tunc* as there is

no prejudice to any defendant; (8) declaring that defendant must answer within 20 days of the Court's order or plaintiff can move for default judgment; and (9) that defendants were in no way prejudiced by the amendment of the Summons and Complaint.

Empire City's Reply

In response, Empire City Subway Limited contends that plaintiff concedes that he did not attempt to serve Empire City Subway with the original pleading containing the misnomer. While plaintiff asserts CPLR § 306(b) provides him with a 120-day period to amend the complaint as of right without leave of court, CPLR § 306(b) only provides 120 days to serve a proper complaint and it does not provide that length of time to amend a complaint as of right. CPLR § 3025(a), however, provides that a party may amend her complaint once as a matter of right within 20 days after its service or at any time before the period for responding to it expires, or within 20 days after service of a pleading responding to it. The CPLR § 3025(a) provision for amending the complaint without leave also appears to be controlled by the service of the pleading. Since there was no service of the original pleading upon Empire City Subway Limited, plaintiff did not properly file an amended pleading with the Court on February 25, 2008 before any service on Empire City Subway Limited. Thus, the service on Empire City Subway Limited of the improperly Amended Complaint was a nullity and is void *ab initio* and this Court lacks jurisdiction over the Empire City Subway Limited. Because Empire City Subway Limited was not and could not have been made aware of the plaintiff's attempt to file an action against it within the Statute of Limitations period, dismissal of the Amended Complaint is warranted and plaintiff's cross-motion should be denied.

D&S's Opposition to Plaintiff's Cross-Motion and Reply

D&S submits a signed affidavit from Bogoban Joldzic, identical to the one annexed to its original cross-motion. With respect to the permit submitted by plaintiff, D&S argues that such uncertified work permit lacks probative value, would be inadmissible at trial, and thus, does not reflect any evidence that D&S actually performed work in the area mentioned in the permit.

Plaintiff's Reply to D&S

In reply, plaintiff argues that D&S cannot present evidence as part of its reply or affidavit in opposition. Since D&S failed to serve any evidentiary proof with its motion, there is no need to shift any burden to plaintiff. D&S's insistence that there was sufficient notice of its intent to submit a signed affidavit or that there is no prejudice to the plaintiff does not justify the failure to include admissible evidence with its motion. It is uncontested that the unsigned affidavit is inadmissible. Even if the affidavit were considered, it would be inadequate to support the motion since plaintiff raised a question of fact as to whether D&S worked in the area where plaintiff fell prior to her fall.[3]

Analysis

Empire City Subway Limited's motion is predicated upon CPLR § 3211(a)(5) (statute of limitations), CPLR § 3211(a)(2) (the court lacks jurisdiction of the subject matter of the cause of action), and CPLR § 3211(a)(8) (the court lacks jurisdiction of the person of the defendant).

It is uncontested that the Statute of Limitations for plaintiff's tort causes of action is three-years from the date plaintiff's cause of action accrued on November 1, 2004 (*see* CPLR §

[3] Plaintiff did not submit a Reply to Empire City Subway Limited's opposition papers.

214[4]). Therefore, the Statute of Limitations of plaintiff's tort action expired on November 1, 2007. Pursuant to CPLR 304(a), an action is commenced by filing a summons and complaint, and is deemed, for Statute of Limitations purposes, to have been commenced when the summons and complaint are filed with the clerk of the court (*Westnine Asso. v West 109th Street Asso.*, 247 AD2d 76, 677 NYS2d 557 [1st Dept 1998]; CPLR § 2102(a)). Here, the initial Summons and Complaint, naming "Empire City Subway," was timely filed on November 1, 2007, within three years from the date of plaintiff's accident. It is the actual filing of a summons and complaint or a summons with notice which commences the action and therefore tolls the Statute of Limitations (*De Maria v Smith*, 197 AD2d 114, 610 NYS2d 689 [3d Dept 1994] *citing* CPLR § 203[c]). Thus, that plaintiff did not effect proper service of the original Complaint upon Empire City Subway Limited did not render the action untimely.

Pursuant to CPLR § 306-b, plaintiff then has 120 days to effect service so as to grant the court jurisdiction (*de Vries v Metropolitan Transit Auth.*, 11 AD3d 312, 783 NYS2d 540 [1st Dept 2004]). Thus, in this matter, plaintiff had until February 29, 2008 to effect service upon "Empire City Subway" in order to grant the court jurisdiction over said defendant. According to plaintiff, service upon "Empire City Subway" was rejected, however, by the Secretary of State because the true name of said defendant was "Empire City Subway Company (Limited)."

The Court notes that amendments to the caption "are permitted where the correct party defendant has been served with process, but under a misnomer, and where the misnomer could not possibly have misled the defendant concerning who it was that the plaintiff was in fact

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[4] The following actions must be commenced within three years: . . . 5. an action to recover damages for a personal injury . . . .

seeking to sue" (*Air Tite Mfg., Inc. v Acropolis Asso.*, 202 AD2d 1067, 612 NYS2d 706 [1st Dept 1994] [permitting amendment to caption where defendant, a partnership, was improperly named as a corporation and it defended in its capacity as a partnership, where such misnomer in the caption was an obvious mistake and its correction did not prejudice defendant], *citing Creative Cabinet Corp. v Future Visions Computer Store*, 140 AD2d 483, 484-485]). Contrary to Empire City Subway Limited's contention, the Amended Complaint did not add it as a "new" party to the action. When plaintiff filed the Amended Complaint on February 25, 2008 reflecting "Empire City Subway Company (Limited)", the Amended Complaint simply superceded the original Complaint.

The real issue presented by the plaintiff is not that the amendment was made prior to the commencement of the action. The real issue is the apparent "gap" not expressly addressed in the CPLR when an action is properly commenced by the filing of a summons and complaint, and an amendment to that pleading is sought prior to proper service of the pleading.

As to amending the pleading to correct the name of a party, CPLR § 3025(a) permits a plaintiff to amend the "pleading once without leave of court within twenty days after its service, *or at any time before the period for responding to it expires*, or within twenty days after service of a pleading responding to it" (emphasis added) (*see also Nikolic v Federation Employment and Guidance Service, Inc.*, 18 AD3d 522, 795 NYS2d 303 [2d Dept 2005]). "The clear purpose of this [rule] is to allow parties to recognize and correct pleading errors without burdening themselves, their opponents or the courts with motion practice" *(Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group, Inc.*, 138 Misc 2d 799, 525 NYS2d 541 [Sup Ct New York County [1988] [CPLR § 3025(a) allows a party to amend a pleading without leave of

court, so long as he does so within twenty days after it is served, before any responsive pleading is due, or within twenty days after a responsive pleading is served]). Thus, plaintiff could amend her Complaint without leave of court (1) within 20 days after its service, (2) at any time before Empire City Subway Limited's time to respond to it expires, or (3) "within twenty days after service of a pleading responding to it."

Here, plaintiff's service of the "pleading" *i.e.*, the original Complaint, upon Empire City Subway Limited was a nullity because it was rejected by its agent, the Secretary of State. Thus, "service" of the Complaint was never effectuated, so as to trigger plaintiff's time to amend under the first option ("within 20 days after its service"). Further, plaintiff's time to amend the Complaint was not triggered under the second option ("at any time before the period for responding to it expires"), since defendant's time to respond to it has yet to expire. In other words, since Empire City Subway Limited's time to respond to the Complaint never expired, the twenty-days within which plaintiff must amend the Complaint without leave of court never expired. Moreover, even if the Court did not deem the service of the original Complaint a nullity, plaintiff would still have twenty days after service of Empire City Subway Limited's "pleading responding to it," pursuant to the third option, which has yet to occur. As Empire City Subway Limited never responded to the Complaint, the plaintiff's time to amend never triggered under the third option.

The Court notes that the record indicates that D&S served an Answer to the *Amended* Complaint. However, the fact that D&S served an Answer to the Amended Complaint does not warrant a different result given that D&S rests on the arguments made by Empire City Subway Limited. Moreover, the same effect of CPLR 3025(a) applies, in that plaintiff's time to amend as

of right is triggered only upon (1) service of the original Complaint and (2) service of a pleading in response to the original Complaint, none of which applies here.

Therefore, plaintiff's service of the Amended Complaint on February 26, 2008 did not violate either the express terms of CPLR § 3025, which is triggered upon proper *service*, or the purpose of CPLR § 3025, which is to avoid unnecessary motion practice.

The law is scant on this issue. This Court found one case from 1988, which also involved a plaintiff's alleged failure to comply with the time restrictions of CPLR 3025.

Sholom & Zuckerbrot Realty Corp. v Coldwell Banker Commercial Group (138 Misc 2d 799, 525 NYS2d 541 [Supreme Court Queens County 1988]), likewise involved the issue of whether a plaintiff is required to obtain leave of court before serving the amended complaint. Before the Court was a CPLR 3211(e)[5] motion to dismiss the complaint in an action to collect a brokerage commission. After citing to CPLR 3025(a), the Court noted that the clear purpose of this section of the CPLR is to allow parties to recognize and correct pleading errors without burdening themselves, their opponents or the courts with motion practice. The defendant requested and received an extension of time to respond or move with respect to the complaint. On the last day of the extension period, defendant moved to dismiss the complaint, for failure to state a cause of action. Three days later, the plaintiff served an amended complaint to rectify the claimed deficiencies in the complaint, and argued that this amendment was available as of right under CPLR 3025(a), and rendered the motion moot. Defendant has rejected the amended complaint, and argued that once it has moved to dismiss, the amendment as of right is no longer

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[5] CPLR 3211(e) allows a party to respond to a CPLR 3211(a)(7) motion dismiss a pleading for failure to state a cause of action or defense by requesting leave to plead again.

available, and plaintiff must meet the more stringent test of CPLR 3211(e).

In rejecting defendant's argument, the Court stated that CPLR 3211(e) "should not be read so as to obviate the availability of an amendment as of right under CPLR 3025(a). To do so would be to frustrate the intent of CPLR 3025(a) to allow some leeway to a pleader who acts expeditiously to correct his pleading. Since the defendant's motion to dismiss "had the effect of extending its time to answer the complaint," the plaintiff's amendment was timely. "The plaintiff was not required to obtain leave of court before serving the amended complaint. Since the defendant's motion to dismiss had the effect of extending its time to answer the complaint, the Court concluded that the plaintiff's amendment was timely, and that the plaintiff was not required to obtain leave of court before serving the amended complaint.

While Empire City Subway Limited contends that no stipulation or motion to amend was filed, such requirements are necessitated only where plaintiff's *service* of the pleading has been effectuated. Since the original Complaint was never served upon Empire City Subway Limited, defendants' time to answer the Complaint, never triggered, and was effectively extended until such service was made (*see Olsen v 432 East 57th Street Corp.*, 145 Misc 2d 970, 548 NYS2d 864 [Supreme Court New York County 1989] ["The first responsive pleading required of the defendant . . . is its answer, which is not required to be served until after the complaint has been served"]).[6] Therefore, plaintiff was not required to seek leave from the Court, or obtain a stipulation to amend the Complaint prior to its filing of the Amended Summons and Complaint.

Pursuant to CPLR § 203(f), a "claim asserted in an amended pleading is deemed to have

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[6] CPLR 3012(a) provides in part: "The complaint may be served with the summons .... Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds". Under CPLR 3011 a plaintiff's initial pleading in an action is the complaint, not the summons with notice served without the complaint.

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." As the original Complaint and Amended Complaint contain identical factual allegations and causes of action, the Complaint provided sufficient notice of the transactions and occurrences giving rise to the causes of action in the Amended Complaint. Notably, there is no indication that "Empire City Subway" is an entity different from "Empire City Subway (Limited)." Therefore, the Amended Complaint is deemed "interposed" or commenced as of the date of filing of the original Complaint, and therefore, is timely.

Furthermore, plaintiff's service of the Amended Complaint upon Empire City Subway Limited on February 26, 2008, was timely, as it was served within 120 days after the original Complaint and Amended Complaint were filed. While late service is permissible under CPLR 306-b "upon good cause shown or in the interest of justice" (*Spath v Zack*, 36 AD3d 410, 829 NYS2d 19 [1st Dept 2007]), the service of the Amended Complaint was timely. Therefore, the Court also does not reach the issue of whether plaintiff established "good cause," or whether in "the interest of justice," late service of the Amended Complaint should be permitted. As such, leave to permit late service pursuant to CPLR 306-b of same is not required.

Therefore, the motion by Empire City Subway Limited and cross-motion by D&S to dismiss the Amended Complaint on the ground of Statute of Limitations lack merit and are denied.

As to D&S's motion for summary judgment, it is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of

action . . . has no merit" (CPLR § 3212[b]), sufficient to warrant the court as a matter of law to direct judgment in his or her favor (*Bush v St. Claire's Hosp.*, 82 NY2d 738, 739 [1993]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Wright v National Amusements, Inc.*, 2003 NY Slip Op 51390 [Sup Ct New York County, Oct. 21, 2003]). This standard requires that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 (b)). The moving party must demonstrate entitlement to judgment as a matter of law (*Zuckerman v City of New York,* 49 NY2d 557, 562, 427 NYS2d 595; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498), and the failure to make such a showing will result in the denial of the motion, regardless of the sufficiency of the opposing papers (*Pappalardo v New York Health & Racquet Club*, 279 AD2d 134, 718 NYS2d 287 [1st Dept 2000] *citing Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982, 985, 599 NYS2d 526; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853, *supra*).

It is uncontested that the motion by D&S is supported solely by an unsigned and unsworn affidavit and an attorney's affirmation. Absent an affidavit from D&S's President or other employee with knowledge of the material facts, this evidence was not in admissible form (*see*

Regent Corp., U.S.A. v Azmat Bangladesh, Ltd., 253 AD2d 134, 686 NYS2d 24 [1st Dept 1999]). The failure of D&S to establish its right to summary judgment as a matter of law requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Diaz v Nunez*, 5 AD3d 302 [1st Dept 2004] [motion for summary judgment should have been denied regardless of the sufficiency of plaintiff's opposing papers]).

In any event, the copy of the work permit submitted by plaintiff raises an issue of fact as to whether D&S actually performed work in the location of plaintiff's fall. That the work permit is uncertified is not fatal to plaintiff's ability to use such document to raise an issue of fact under the circumstances. It is premature, at this juncture, in the absence of further discovery and depositions, to conclude that D&S did not perform work at the subject accident location as a matter of law.

Therefore, the Court does not reach the merits of plaintiff's opposing contentions.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by Empire City Subway (Limited) to dismiss the Amended Complaint is denied; and it is further

ORDERED that the cross-motion by D & S Restoration, Inc. to dismiss the Amended Complaint is denied; and it is further

ORDERED that the branch of the cross-motion by plaintiff for an order (1) declaring the amended Summons and Complaint deemed filed *nunc pro tunc* as though it were filed at the same time as the initial summons and complaint; (2) excusing the misnomer of naming Empire City Subway Company (Limited) as Empire City Subway and permitting amendment of same

nunc pro tunc and deeming the amended summons filed at the same time as the initial summons and complaint or allowing same to be considered as such *nunc pro tunc*; (3) that service of the amended Summons and Complaint establishes personal and subject matter jurisdiction over all defendants since the Amended Summons and Complaint was served within the 120 day period set forth in CPLR § 306(b), that it was timely, satisfying the statute of limitations, and that since the Amended Summons and Complaint was filed and served prior to the time for service of an answer, leave of the court to amend was not required, and the filing date of the amended summons and complaint relates back to the original Summons and Complaint; (4) declaring that plaintiff's Amended Summons and Complaint did not involve the addition of a new party, but the minor irregularity of a misnomer that was correct by amendment, and thus, dismiss Empire City Subway's motion; (5) that the Amended Summons and Complaint relates back to the original filing of the initial summons and complaint pursuant to CPLR § 203(f) and that the original pleading gave appropriate notice to all defendants named in the amended summons and complaint, and D&S's cross-motion should be dismissed as the Amended Summons and Complaint was filed and served within the Statute of Limitations; (6) that leave of the Court is not required to amend the summons and complaint and even if it was it is being granted herein *nunc pro tunc* as there is no prejudice to any defendant; (7) declaring that defendant must answer within 20 days of the court's order or plaintiff can move for default judgment; and (8) that defendants were in no way prejudiced by the amendment of the Summons and Complaint is granted; and it is further

ORDERED that the branch of the cross-motion by plaintiff for an order granting amendment of the Summons and Complaint *nunc pro tunc* or allowing an extension of time pursuant to CPLR 306(b) to serve the original Summons and Complaint and thereafter allowing an amendment as the Court is allowed to extend the time even without good cause shown, even though there is in the instant matter, in the interest of justice is denied as moot; and it is further

ORDERED that defendant shall serve an answer within 20 days of service of this order and notice of entry; and it is further

ORDERED that plaintiff 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: July 16, 2008

Hon. Carol Robinson Edmead, J.S.C.

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COUNTY CLERK'S OFFICE
NEW YORK