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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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NEW YORK CENTRAL INSURANCE
COMPANY a/s/o WEAVER FABRICS, INC.,

Plaintiff,

Index No.: 603073/2009

-against-

DECISION/ORDER

BERDAR EQUITIES, CO., BEST YEARS FASHION, INC., LONGWOOD FASHION, INC., DIRECT APPAREL INC., LMN FASHION, INC., INSURED SYSTEM FASHION, ABC CO/CORP 1-5, (names being fictitious Designations of unknown entities),

Defendants.

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HON. CAROL EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action by New York Central Mutual Fire Insurance Company ("NY Central") as a subrogee of Weaver Fabrics ("Weaver"), defendants Longwood Fashion, Inc. ("Longwood"), Direct Apparel Inc. ("Direct"), and System Fashion Inc. s/h/a Insured System Fashion ("System") (collectively, "defendants") move (1) pursuant to CPLR §3025(b) for leave to permit System to amend its answer to assert the statute of limitations as an affirmative defense, and for leave to permit defendants to amend their answer to assert the affirmative defense of lack of personal jurisdiction and (2) pursuant to CPLR 3211(a)(5) to dismiss plaintiff's complaint as time-barred and for lack of personal jurisdiction.

Background Facts

The following facts are based on the parties' submissions.

The underlying action arose from an incident on December 28, 2006, at a building located

on 257 West 39th Street (the "building"), where Weaver and defendants were commercial tenants. Weaver claimed that defendants permitted water to spill out of a window, onto the roof below, which permeated through the roof and onto Weaver's inventory and personal property.

On or about March 6, 2007, pursuant to the insurance policy dated October 11, 2006, No.: BOP6121517, NY Central paid $400,000 to Weaver in connection with the incident. Thereafter, on or about June 22, 2007, Weaver commenced a negligence action (Index No.108705/2007) against Berdar Equities Co. ("Berdar"), the building owner, and Best Years Fashion, Inc. ("Best Years") (the "original defendants"), the predecessor in tenancy of System alleging damages "not covered by any insurance" in the amount of $221,113.08 (the "Weaver action"). Weaver thereafter discontinued its action as against Best Years pursuant to a stipulation.

Approximately two years later, on September 11, 2009, Weaver amended its Complaint by naming Longwood, Direct, and LMN Fashion, Inc ("LMN"), as additional defendants, containing the same allegations of property damage as in the original complaint (exhibit B).[1]

On October 7, 2009, NY Central commenced a subrogation action (Index No.: 603073/2009) against the original defendants Berdar and Best Years[2] and thereafter moved to consolidate the subrogation and the underlying action, but later, withdrew said motion based "on the understanding that the underlying Weaver action had settled."[3]

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[1] According to NY Central, Weaver stopped cooperating with NY Central, and thus, NY Central was unaware of Weaver's independent investigation regarding the new defendants.

[2] NY Central later discontinued with prejudice its claims against Berdar and Best Years pursuant to separate stipulations.

[3] The court's records show that the Weaver action was discontinued pursuant to the parties' stipulation, filed in September, 2010.

Thereafter, on or about September 3, 2010, without leave of court, NY Central served a supplemental Summons and Complaint, naming System, Direct, and Longwood as additional defendants. System served its answer to NY Central's complaint, asserting various defenses, but did not raise the affirmative defenses of lack of personal jurisdiction or the statute of limitations (exhibit E). Longwood and Direct served their joint answer (exhibit F), asserting, *inter alia*, an affirmative defense that the action by NY Central "was not commenced within the time prescribed by law" (id., ¶33). Neither Longwood nor Direct raised the defense of lack of personal jurisdiction.

In support of their motion to amend, defendants first contend that NY Central cannot claim prejudice or surprise since it knew that the supplemental complaint was time-barred in the absence of proof that it related back to original complaint against Bedar and Best Years. Also, because the accident occurred on December 28, 2006, the amendment has merit since NY Central did not sue defendants until September 3, 2010.

Defendants further argue that NY Central's complaint against them should be dismissed as time-barred. The complaint against defendants was filed more than eight months after the expiration of the three year statute of limitations period applicable to property damage actions. And, the complaint is not saved by the relation back doctrine since the defendants are not "united in interest" with the original defendants, Berdar and Best Years (CPLR 203 (c)), as they do not have identical defenses. Direct, Longwood and System do not share the same defenses as Berdar, since they do not have a waiver of subrogation defense, which Berdar presumably used to get NY Central to discontinue against it. Nor do defendants share the same defenses with Best Years, a separate distinct entity which did not come into possession of the fourth floor of the

building until after the accident. The only relationship between defendants and Best Years is that System assigned its lease to Best Years. And, by discontinuing against Berdar and Best Years, and not against defendants, NY Central demonstrates that it is not united in interest with defendants.

And finally, plaintiff's failure to seek leave to serve the supplemental summons and complaint pursuant to CPLR §§3205 and 1003 upon the new defendants is a jurisdictional defect rendering the complaint a nullity, subject to dismissal pursuant to CPLR 3211 (a)(8). While defendants did not assert lack of jurisdiction in their answers, they should be granted leave to amend the answer because it plainly has merit.

Defendants submit their proposed Answer, which includes said affirmative defenses (see exhibit I).

NY Central opposes the motion, arguing that the court should deny the request for leave to amend arguing that the general rule of granting of leave to amend (CPLR § 3025(b)) does not apply to the affirmative defense of statute of limitations since CPLR 3211(a) provides that the statute of limitations defense is waived unless raised in the answer or pre-answer motion to dismiss and System did not raise this defense in its answer or interpose a pre-answer motion to dismiss.

NY Central also argues that its action against defendants is timely under the "relation back" doctrine, pursuant to CPLR §203 (f) entitled "Claim in amended pleading" and existing case law. Weaver timely impleaded Longwood and Direct in its propery action in September 2009, and thus, defendants were not "strangers" to the facts and allegations of the instant subrogration suit. This action is merely one for subrogation "arising out of the exact same

transaction as underlying property damage action," and Longwood and Direct were on notice of the potential subrogation action when they were impleaded by Weaver. Thus, the instant subrogration claims relate back to September 2009. In addition, Direct's answer in the Weaver action acknowledged that some or all of Weaver's damage may be covered by collateral sources, such as property insurance. The relationship between the defendants is irrelevant.

Likewise, the court should deny defendants' request for leave to amend and for dismissal based on lack of personal jurisdiction pursuant to CPLR § 3211(a)(8). Defendants waived this jurisdictional defense failing to assert this defense in their answer or in a pre-answer motion to dismiss. Having voluntarily submitted to the jurisdiction of this court, their arguments as to the propriety of untimely amending the Complaint without a motion are irrelevant and should be disregarded.

In reply, defendants contend that notwithstanding CPLR 3211 (e)'s waiver provision, the statute of limitations defense may be asserted pursuant to CPLR 3025 (b), because under the relevant inquiry, NY Central has not demonstrated any significant prejudice and the amendment has merit since the complaint is time-barred.

Defendants further contend that NY Central's amended complaint in this subrogation action does not relate back to the complaint filed in the separate Weaver action. Further, whether defendants were on notice of the transactions or occurrences is irrelevant because such notice for "relation back" doctrine's purposes under CPLR §203 (f) must be in the "original pleading" and the pleading NY Central relies on is from another action, and thus is not the "original pleading." The only pleading NY Central could use to relate back its complaint against defendants is the one filed against Berdar and Best Years. NY Central made no effort to link its original complaint

against Bedar or Best Years (the original defendants) to its amended complaint against defendants.

Discussion

Personal Jurisdiction Defense

As an initial matter, the court notes that defendants' reply does not dispute NY Central's contention that defendants waived the defense of lack of personal jurisdiction by failing to raise same in their Answer or pre-answer motion to dismiss. As such, leave to amend the Answer to assert the defense of lack of personal jurisdiction, and to dismiss pursuant to CPLR 3211(a)(8) on this ground, is unwarranted[4]

Relation Back Doctrine

An insurer's subrogation action is governed by the same statute of limitations applicable to the underlying personal injury or [property damage] action (*Allstate Ins. Co. v Stein*, 1 NY3d 416, 775 NYS2d 219 [2004], *citing Walker v Stein*, 305 AD2d 972, 758 NYS2d 451 [4th Dept 2003]), and CPLR §214 (4) provides for a three-year limitations period for "an action to recover damages for an injury to property."

It is undisputed that the three-year limitation for property damage actions expired on December 28, 2009 and NY Central's claims against the new defendants, Longwood, Direct and System, were asserted in the amended complaint more than eight months after the expiration of the limitations period.

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[4] The court additionally notes that in any event, defendants waived their defense of lack of personal jurisdiction since none of the defendants asserted this defense in their answers (CPLR 3211 [e]; *see McGowan v Hoffmeister*. 15 AD3d 297 [1st Dept 2005][by appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendants conferred jurisdiction upon the court and waived the defense]; *Urena v NYNEX*, Inc., 223 AD2d 442 [1996]).

NY Central, however, citing CPLR 203(f), contends that the claims in the amended complaint "relate back" to the date of claims in Weaver's complaint and that accordingly, its subrogation action against the new defendants is timely.

To clarify, NY Central does not dispute, or even argue, that its amended subrogation claim against the new defendants relates back to the date of service of its subrogation claim against the original defendants pursuant to CPLR 203(c), which allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for the statute of limitations purposes, where the two defendants are "united in interest" (CPLR 203 [c]; *Mondello v New York Blood Center - Greater New York Blood Program* (80 NY2d 219, 226 [1992]).[5] Neither does NY Central argue that the new defendants can be charged with notice of the subrogation action based on the "unity of interest"[6] with the original defendants Berdar and Best Years.

Rather, NY Central relies on the relation back doctrine codified in CPLR 203(f), generally invoked where a plaintiff seeks to add an additional *claim* against a *defendant already a* party in the action. CPLR 203(f) provides that an otherwise untimely claim in an amended

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[5] In *Mondello v New York Blood Center - Greater New York Blood Program* (80 NY2d 219, 226 [1992]), the Court of Appeals adopted a three-part test for claims against one defendant to relate back to claims asserted against another: (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 an excusable mistake by the plaintiff in identifying all the proper parties, the action would have been brought against the additional party united in interest as well.

[6] It has been held that "unity of interest"between defendants exists where "there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Vanderburg v Brodman* 231 AD2d 146, 147, 660 NYS2d 438 [1st Dept 1997], *citing Mondello v New York Blood Center*, 80 NY2d 219, 590 NYS2d 19 [1992]).

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" (CPLR 203 (f)).

"The *sine qua non* of the relation[ ]back doctrine is notice" (*Pendleton v City of New York*, 44 AD3d 733, 736, 843 NYS2d 648 [2007]), and the requisite notice must be contained in the original pleading (*see Coleman, Grasso & Zasada Appraisals v Coleman*, 246 AD2d 893, 894, 667 NYS2d 828 [1998], *lv dismissed* 91 NY2d 1002, 676 NYS2d 129, [1998], 94 NY2d 849, 703 NYS2d 71 [1999]). "Where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint, the doctrine is unavailable" (*Pendleton*, *supra* at 736).

While Weaver's claim in the underlying action is not, as defendants point out, "the original pleading," courts have applied the relation back doctrine in cases involving two separate actions, where the unity of interest element is satisfied (*Buran v Coupal,* 87 NY2d 173, 638 NYS2d 405 [1995] [trespass action against wife related back to filing of action against husband for purposes of calculating the ten-year period of adverse possession, where both defendants had notice based on unity of interest, claims arose of same occurrence, and but for mistake, the action would have initially been brought against the new party as well]; *Dort v Aylmer*, 176 Misc 2d 620, 673 NYS2d 556 [Sup Ct, Sullivan County 1998] [untimely personal injury suit against the owner of a trailer park deemed to relate back to a timely personal injury suit against the owners of the lot; the owner of a trailer park had notice since he included plaintiff's claim as a debt in his bankruptcy proceeding]).

However, even assuming the "relation back" doctrine applies to the two separate actions herein, the court finds that the allegations in the Weaver action did not provide the new defendants with the requisite notice of the transactions or occurrences, *to be proved* pursuant to the pleadings in NY Central's instant subrogation action.

First, the court finds that System, as a new defendant in NY Central's subrogation action, had no notice, since it was not even named as a defendant in Weaver's complaint or Weaver's amended complaint in the underlying action, and thus, there is no claim to which the instant claims by NY Central against System can relate. Thus, NY Central's claim as against System is untimely.

As to Long and Direct, the court finds that NY Central failed to demonstrate that the amended pleadings in Weaver's action put these defendants on notice that they would be potentially liable for damages incurred by Weaver's insurer (see *Pendleton v City of New York, supra, citing Hyacinthe v Edwards*, 10 AD3d 629 [2004] [relation back doctrine inapplicable where the original allegations did not provide the defendants notice of the need to defend against the allegations of the amended complaint]). Specifically, Weaver's amended complaint alleges that "by reason of [Direct, Longwood and LMN's negligence in permitting water to cause damage to Weaver Fabrics' personal property], plaintiff sustained damages *not covered by any insurance* in the sum of Two Hundred Twenty One thousand, One Hundred Thirteen Dollars and Twenty-Eight Cents ($221,113.28)" (Weaver Second Amended Complaint, ¶¶21; 24). Alternatively, NY Central's amended complaint alleges that, *inter alia*, Longwood and Direct (and System) are liable for property losses in the amount of $400,000 as "paid to [Weaver] [pursuant to] the policy limits" (NY Central Complaint, ¶¶18 - 20).

Thus, even though NY Central's subrogation claim for the damages covered by its policy arose out of the "same occurrence" that gave rise to Weaver's claim, *i.e.*, water damage to the subject property, Weaver's underlying claim against Longwood and Direct arises from risks which are different from those against which NY Central provided insurance coverage to Weaver and for which NY Central now seeks as damages (*see MTB Banking Corp. v Consolidated Edison Co. of New York, Inc.*, 197 AD2d 479, 603 NYS2d 6 [1st Dept 1993][in a subrogation action, the relation back doctrine inapplicable where the purported amendment to the *ad damnum* clause by insurer-subrogee was an attempt by the insurer-subrogee to assert the time-barred claim of the insured plaintiff herein]; *Agway Insurance Co. v P and R Trust Company, Inc., et al.*, 11 AD3d 975, 783 NYS2d 189 [4th Dept 2004][insured's proposed claim as intervenor-plaintiff, to recover *uninsured business losses arising from allegedly defective construction of barn roof* did not relate back to interposition of subrogation claims by which insurer, as insured's subrogee, sought to recover for *insured loss resulting from collapse of roof*]; *Insurance Co. of N. Am. v Hellmer*, 212 AD2d 665, 665-666, 622 NYS2d 767 [2d Dept 1995][denying motion to add as additional plaintiff the subrogor of moving plaintiff where subrogor sought "to increase the *ad damnum* clause by more than $300,000 to reflect an otherwise time-barred claim for uninsured fire losses suffered by subrogor]).

Accordingly, in the absence of notice to the new defendants that they would be liable for damages incurred by NY Central as Weaver's subrogee, said defendants had no "notice of the transactions or occurrences, to be proved pursuant to the pleadings" asserted in NY Central's subrogation action. Thus, NY Central is not entitled to the benefit of the relation-back doctrine.

Finally, the court notes that NY Central's argument that it was purportedly unaware of

Weaver's investigation of the new defendants because Weaver stopped cooperating with NY Central after receiving the insurance proceeds, is insufficient to establish that the new defendants had notice so as to warrant the application of relation back doctrine in this case.[7]

The cases relied on by NY Central are factually distinguishable and do not mandate a contrary result. The cases of *McHale v Anthony* (41 AD3d 265 [1st Dept 2007]), *Omiatek v Marine Midland Bank, N.A.* (9 AD3d 831 [4th Dept 2004]), and *Kaczmarski v Suddabv* (9 AD3d 847 [4th Dept 2004]) concerned the courts' application of the relation-back doctrine in subrogation claims asserted, unlike here, through intervention in the same action. And, *Duffy v Horton Memorial Hospital* (66 NY2d 473, 497 NYS2d 890 [1985]) involved the application of the doctrine to a direct claim against a party originally brought into the action as a third-party defendant.

Accordingly, since NY Central's claims in the amended complaint do not "relate back" to the date of claims in Weaver's complaint, NY Central's subrogation action against the new defendants is time-barred.

Leave to Amend System's Answer

Under the general rule, "any objection or defense based upon the ground of the statute of limitations is deemed waived unless it is raised either in the responsive pleading or by motion to dismiss" (*see* CPLR 3211 [e];[8] *Dougherty v City of Rye*, 63 NY2d 989, 991-992 [1984]; *Velez v Policastro*, 1 AD3d 429, 431 [2003]; *Horst v Brown*, 72 AD3d 434 [1st Dept 2010], *citing*

[7] In such a case, NY Central's cause of action may lie against Weaver as its subrogor, for lack of cooperation.

Buckeye Retirement Co., L.L.C., Ltd. v Lee, 41 AD3d 183 [2007]). However, unlike the personal jurisdiction defense, the defense of statute of limitations in an amended answer can be granted, in the court's discretion, absent prejudice or surprise to the plaintiff *(see Seda v New York City Hous. Auth.*, 181 AD2d 469, 581 NYS2d 20 [1992], *lv denied* 80 NY2d 759, 589 NYS2d 309 [1992], *citing Fahey v County of Ontario*, 44 NY2d 934, 408 NYS2d 314 [1978]). Thus, it is well-established that "leave to amend pleadings [to add the statute of limitations defense] should be freely allowed," except where the proposed defense clearly lacks merit *(Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 544 NYS2d 580 [1989]; *Herrick v Second Cuthouse*, 64 NY2d 692, 485 NYS2d 518 [1984]) or, there is prejudice or surprise resulting directly from the delay (CPLR §3025(b);[9] *Solomon Holding Corp., v Golia*, 55 AD3d 507, 868 NYS2d 612 [1st Dept 2008], *citing Fahey v County of Ontario*, 44 NY2d 934 [upholding the trial court's grant of defendants' cross-motion to amend answer so as to add the affirmative defense of the statute of limitations in the absence of demonstrated prejudice to plaintiff]).

Here, in light of the above discussion, System's proposed affirmative defense of the statute of limitations clearly has merit. And, there is nothing in the record to indicate prejudice to NY Central, as a result of System's delay[10] in seeking the amendment, *i.e.*, that NY Central has "lost some special right or incurred some change of position or some significant expense" (*Solomon Holding Corp. v Golia*, 55 AD3d 507, *supra*; *Seda v New York City Hous. Auth.*, 181 AD2d 469, *supra*). Indeed, had System asserted the defense in its original answer, NY Central's

[9] CPLR §3025(b) provides that "leave to amend a pleading should be freely granted provided there is no prejudice or surprise to the nonmoving party."

[10] The court's records indicate that System moved to amend its answer on or about June 30, 2011, approximately eight months after joining issue on or about October 8, 2010.

claim would still have been time-barred.

NY Central's reliance on *Horst v Brown* (*supra*), for the proposition that the liberal rule of CPLR 3025 does not apply to amendments to add an affirmative defense of the statute of limitations, is unavailing, as the defense there was waived by the failure to raise it either in an answer or in a pre-answer motion to dismiss (CPLR 3211 [e]). Unlike the defendant in *Horst*, System herein made no pre-answer motion, and its answer therefore "remains subject to amendment" (*Seda v New York City Hous. Auth.*, 181 AD2d at 470, *supra*).

Therefore, since System's proposed defense of the statute of limitations has merit and in the absence of demonstrated prejudice to NY Central, leave to permit System to amend its answer is granted, System's answer is deemed amended, and NY Central's complaint as against System, Longwood and Direct is dismissed.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branches of the motion by defendants Longwood Fashion, Inc., Direct Apparel Inc., and System Fashion Inc. s/h/a Insured System Fashion (1) pursuant to CPLR §3025(b) for leave to permit System to amend its answer to assert the statute of limitations as an affirmative defense, is granted, and (2) pursuant to CPLR 3211(a)(5) to dismiss plaintiff's complaint as time-barred, is granted; and it is further

ORDERED that the branches of defendants' motion (1) pursuant to CPLR §3025(b) for leave to permit defendants to amend their answer to assert the affirmative defense of lack of personal jurisdiction and (2) pursuant to CPLR 3211(a)(5) to dismiss plaintiff's complaint for lack of personal jurisdiction, is denied; and it is further

ORDERED that the action as asserted against defendants Longwood Fashion, Inc., Direct Apparel Inc., and System Fashion Inc. s/h/a Insured System Fashion is hereby severed and dismissed; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 24, 2011

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

HON. CAROL EDMEAD