

Carrasquillo v State of New York

2013 NY Slip Op 33464(U)

December 24, 2013

Supreme Court, New York County

Docket Number: 104141/10

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon John A. Miller
Justice

PART 11

Index Number : 104141/2010
CARRASQUILLO, JESUS
vs.
S&S FIRE PROTECTION
SEQUENCE NUMBER : 004
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE 12/12/13
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). _____

Repeating Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is ^{cross motion re} decided in accordance with the attached Memorandum Decision FO.

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

FILED
JAN 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

JAN 04 2014

Dated: December 24, 2013

[Signature], 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

-----X Index No.: 104141/10
ex rel. JESUS CARRASQUILLO

Plaintiff,

BRINGING THIS ACTION ON BEHALF OF
THE STATE OF NEW YORK, THE VILLAGE OF
DOBBS FERRY, THE TOWNSHIP OF CLARKSON,
AND THE VILLAGE OF PIERMONT,

-against-

S&S FIRE PROTECTION SYSTEMS, INC.

Defendant.

-----X
JOAN A. MADDEN, J.:

FILED
JAN 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

In this action brought under the False Claims Act, plaintiff-relator moves, pursuant to CPLR 305(c), to amend the summons and complaint to change the name of the defendant from S&S Fire Protection Systems Inc. ("Fire Protection") to S&S. Fire Suppression Systems, Inc. a/k/a S&S Fire Suppression Systems, Inc. ("Fire Suppression") Defendant opposes the motion and cross moves to dismiss the complaint.

Plaintiff-relator commenced this action in March 30, 2010, by filing a summons and complaint under seal. The summons and complaint identifies the principal place of business for Fire Protection as 425 Western Highway, Tappan, New York, which is the correct address for Fire Suppression. The principal place of business for the named defendant, Fire Protection, which has been out of business since 1993, is in West Nyack, New York. On December 23, 2011, the Attorney General on behalf of the State of New York, submitted to the Court a notice of election to decline intervention, and on March 28, 2012, this court issued an order permitting

the plaintiff-relator to continue the action, unsealing the complaint and directing plaintiff-relator to serve the summons and complaint. The summons and complaint were served upon the bookkeeper for Fire Suppression at its principal place of business at 425 Western Highway, Tappan, New York, which as indicated above, is the address identified in the complaint. On April 9, 2012, the plaintiff-relator filed an amended verified complaint adding a cause of action for wrongful discharge and again served it on the address for Fire Suppression.

Plaintiff-relator now moves to amend the summons and complaint to change the name of the defendant to reflect that he intended to sue Fire Suppression and not Fire Protection, asserting that it is clear in the complaint and the record that he intended to sue Fire Suppression and, in error, misnamed the defendant in the complaint. Specifically, the plaintiff-relator points out, *inter alia*, that he is an employee of Fire Suppression, that the allegations in the complaint relate to work done by Fire Suppression, and that the chief executive officer of Fire Suppression is identified in the complaint.

Defendant opposes the motion, arguing that as Fire Suppression is not a party to this action, it cannot be added under CPLR 305(c), as the statute addresses irregularities in the summons and complaint but does not cure jurisdictional defects. In addition, defendant argues that the case law cited by plaintiff-relator is inapplicable as it does not involve proceedings, like the instant action, brought under the False Claims Act. Moreover, defendant cross moves to dismiss on the grounds that plaintiff-relator has conceded that the named defendant is not a proper party to this action.

The motion and cross motion were not served on the State of New York, which had declined to intervene in the action. By interim order dated October 30, 2013, this court directed

that particularly in light of the nature of the relief sought the State of New York should be given notice of the motion and cross motion and an opportunity to respond. The State of New York responded by affirmation of its counsel stating that “in submitting its Notice of Declination, [the Attorney General’s] Office understood that the target was S&S Fire Suppression Systems [and that] this Office does not seek to conduct any further investigation of the matter based on the correction of defendant’s name in the court filings.¹”

CPLR 305(c) states that the court has discretion to “allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.” The provision has been interpreted as allowing a misnomer in the description of the party defendant to be cured, where, “(1) there is evidence that the correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought.” Ober v. Rye Town Hilton, 159 AD2d 16, 19 (2d Dep’t 1990), citing Stuyvesant v. Weil, 167 NY 421 (1901).

Here, the record demonstrates that the intended defendant, Fire Suppression was properly served. Moreover, Fire Suppression has not demonstrated any prejudice resulting from the amendment. In this connection, there is no evidence that Fire Suppression was unaware of this action, or that it did not know that it was the intended defendant. See Rivera v. Beer Garden, Inc., 51 AD3d 479 (1st Dept 2008)(leave to amend complaint to correct plaintiff’s name was properly granted where evidence showed that “defendant who was aware that it was the intended

¹The Assistant Attorney General also pointed out that the False Claims Act requires the relator in a declined case to serve upon the Office of the Attorney General copies of all court submissions (by any party) and orders as the case progresses. See NY State Finance Law § 190(2)(f).

defendant had in fact been served and would not be prejudiced by the amendment). To the contrary, the record shows that Fire Suppression was served at its principal place of business.

Furthermore, the court notes that despite Fire Suppression's knowledge that it was the proper defendant, in its answer verified by counsel, Fire Protection admitted the allegations in paragraph 6 of the amended complaint which erroneously stated that Fire Protection had its "principal place of business at 425 Western Highway, Tappen, New York, [and that Fire Protection] entered into contracts ... for services related to fire safety inspections and testing." In addition, while the interrogatories were sworn to by the President of Fire Suppression, the interrogatories were answered on behalf of Fire Protection which, as the interrogatories indicated, was a company dissolved in 1993.

Finally, defendant provides no legal or factual basis for its argument that CPLR 305(c) does not apply in instant action seeking relief under the False Claims Act.

Accordingly, the motion is granted, and the cross motion is denied

In view of the above, it is

ORDERED that the plaintiff-relator's motion to amend the amended summons and complaint to correct a misnomer by changing the name of the defendant from S&S Fire Protection Systems Inc. to S&S. Fire Suppression Systems, Inc. a/k/a S&S Fire Suppression Systems, Inc. is granted; and it is further

ORDERED that the defendant's cross motion to dismiss and for sanctions is denied; and it is further


ORDERED that the plaintiff-relator, within 30 days from the date of this order, shall serve a summons and complaint so amended upon S&S. Fire Suppression Systems, Inc. a/k/a

S&S Fire Suppression Systems, Inc. and file the same with the County Clerk with proof of service; and it is further

ORDERED that the plaintiff-relator shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of Trial Support (room 158) who are directed to mark their records to reflect the change in the caption; and it is further

ORDERED that the plaintiff-relator shall serve a copy of this decision and order on the Attorney General's Office.

DATED: December 24, 2013



J.S.C.

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COUNTY CLERK'S OFFICE