Murphy v JRM Constr. Mgt., LLC
2015 NY Slip Op 32396(U)
December 16, 2015
Supreme Court, New York County
Docket Number: 157682/13
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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JOHN MURPHY,

Plaintiff,

-against-

JRM CONSTRUCTION MANAGEMENT, LLC, BROADWAY 340 MADISON FEE LLC, SUNGARD SYSTEMS INTERNATIONAL, INC., and INTERCEPT INTERACTIVE, INC., d/b/a UNDERTONE,

Defendants.

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Index No. 157682/13

Motion seq. nos. 002, 003

DECISION AND ORDER

BARBARA JAFFE, J.

For plaintiff:
David Resnick, Esq.
Philip Monier, III, Esq.
David Resnick & Assocs., PC
450 Seventh Ave.
New York, NY 10123
212-279-2000

For Intercept:
Loretta A. Redmond, Esq.
Quirk & Bakalor, PC
1325 Franklin Ave. Plaza
Garden City, NY 11530
212-319-1000

For JRM:
Nikolaos E. Diamantis, Esq.
Law Office of Charles J. Siegel
125 Broad St., 7th fl.
New York, NY 10004
212-440-2350

By notice of motion, plaintiff moves pursuant to CPLR 3025(b) for an order granting him leave to amend his pleading to add a claim alleging a violation of Labor Law § 241(6), and to amend the caption to include an additional defendant, RXR Realty LLC. Defendant JRM Construction Management, LLC, partially opposes, and defendant Intercept Interactive, Inc., opposes. (Mot. seq. no. 002).

By notice of motion, submitted on default, plaintiff moves for an order extending his time for filing a note of issue. (Mot. seq. no. 003). The motions are consolidated for disposition.

I. PERTINENT FACTS

This action arises from a slip and fall at a construction site in Manhattan. Defendant JRM was the general contractor on the project. Plaintiff was employed by JRM's subcontractor.

Defendants Broadway 340 Madison Fee LLC (Broadway), Sungard Systems International, Inc., and Intercept own, lease, and sublease, respectively, the subject premises. (NYSCEF 40).

On April 3, 2013, plaintiff, a carpenter, slipped and fell in the freight elevator lobby of the subject premises, injuring his knee. According to incident reports dated the same day, plaintiff "fell down and spill[ed] some coffee at loading dock entrance due to Masonite tiling placed by [an employee of JRM]," and "[p]rotection boards were laid down prior to the incident occurring." (NYSCEF 73).

On August 21, 2013, plaintiff commenced this action, asserting claims of negligence against Broadway and JRM. (NYSCEF 1). Once obtaining leave, plaintiff amended his complaint to add Sungard and Intercept as defendants. (NYSCEF 40).

At an examination before trial (EBT) held on April 30, 2015, plaintiff testified, as pertinent here:

> Q. What reason or reasons were you at [the construction site] on April 3, 2013, at 6:45 in the morning?
>
> A. I was picking my tools up to go to another job because the job was over.
>
> . . . .
>
> Q. When had the job been completed?
>
> A. The day before.
>
> . . . .
>
> Q. When you say the job completed, can you be more specific? Just what had you done and what do you mean by the fact that the job was completed?
>
> A. I was finished with what I had to do. But there is always callbacks. The punch list they call them to fix certain things. I am sure they had to go back and do that.

(NYSCEF 68).

At an EBT held on May 18, 2015, the building manager testified that he was employed by RXR Realty LLC, who leased space in the building to Sungard. (NYSCEF 61). At an EBT held on the same day, an Intercept employee testified that RXR managed the building and acted as its "overlandlord." (NYSCEF 63). At an EBT held on May 21, 2015, the Sungard's senior facilities manager testified that it leased space from RXR, that RXR was an agent of Broadway, and that it would arrange and/or coordinate work performed in the building. (NYSCEF 62).

II. MOTION TO AMEND

A. Contentions

In support, plaintiff alleges that he became aware of RXR and its role in the accident during several EBTs, and thus contends it is an appropriate party. He maintains that defendants will suffer no prejudice or surprise as RXR was the "overlandlord" of the premises, had entered into contracts with defendants, and employs one of the deponents. He also argues that his proposed Labor Law claim does not alter the underlying facts in his pleadings or otherwise prejudice defendants. (NYSCEF 57).

In response, JRM contends that plaintiff admits that he was not working at the construction site at the time he was injured and that therefore, his Labor Law claim is meritless. Intercept also argues that plaintiff's testimony establishes that he was not engaged in construction work or in the area where such work was being performed when he was injured, and observes that plaintiff provides no reason for joining an additional party, particularly as all party depositions have now been completed. Both defendants allege prejudice in potentially defending a meritless claim. (NYSCEF 67, 70).

In reply, plaintiff contends that RXR is an owner within the meaning of the Labor Law,

and that defendants do not dispute that he was employed at the construction site. Moreover, he argues that his return to retrieve his tools was related to his duties, that he was "lawfully frequenting" the site, that he did not lose protection under the Labor Law when the work was complete, and that defendants cite no contrary authority. He also contends that the failure to secure the masonite board safely resulted in a tripping hazard within the meaning of the Industrial Code, and that the freight lobby is a "passageway" pursuant to same. (NYSCEF 72).

B. Analysis

1. Applicable law

A motion for leave to amend pleadings pursuant to CPLR 3025(b) is left to the sound discretion of the trial court, and should be freely granted, at any time, absent prejudice or surprise. (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). The motion must be supported by an affidavit of merits. (*Zaid Theatre Corp v. Sona Realty Co.*, 18 AD3d 352, 355 [1st Dept 2005]). A court should deny an amendment that cannot withstand a motion to dismiss (*Scott v Bell Atl. Corp.*, 282 AD2d 180, 185 [1st Dept 2001], *affd as mod sub nom. Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314 [2002]), or if the amendment is patently without merit or palpably insufficient (*Mishal v Fiduciary Holdings, LLC*, 109 AD3d 885, 886 [2d Dept 2013]; *Bryndle v Safety Kleen Sys., Inc.*, 66 AD3d 1396, 1396 [4th Dept 2009]).

2. Labor Law § 246(6)

Pursuant to Labor Law § 241(6), all contractors and owners and their agents must ensure that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully

frequenting such places." The statute was enacted to "protect workers engaged in duties connected to the inherently hazardous work of construction, excavation or demolition." (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101 [2002]).

A claim advanced pursuant to Labor Law § 241(6) may be based on a specific violation of the Industrial Code, which sets forth pertinent safety standards for various enumerated activities. (*St. Louis v Town of N. Elba*, 16 NY3d 411, 414 [2011]; *Naughton v City of New York*, 94 AD3d 1, 9 [1st Dept 2012]). Pursuant to 12 NYCRR 23-1.7(e)(1), "[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping."

A plaintiff is entitled to the protection of Labor Law § 241(6) only if he was "both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent." (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990]; *Agli v Turner Const. Co., Inc.*, 246 AD2d 16, 21 [1st Dept 1998]). The statute does not cover injuries sustained once a project is completed. (*Jaroszewicz v Facilities Dev. Corp.*, 115 AD2d 159, 160 [3d Dept 1985]).

Illustrative of the limit of Labor Law § 241(6) is *Johnson v Ebidenergy, Inc.* There, the plaintiff appeared at a construction site to retrieve paperwork for another job when he was injured by an exploding switch box. (60 AD3d 1419, 1419 [4th Dept 2009]). The Court relied on *Mordkofsky*, *supra*, and held that the plaintiff was not within the class of persons protected under the Labor Law, as he was not "employed" to install the electric metering equipment when the accident occurred. (*Id.* at 1422).

Here, it is undisputed that plaintiff had completed the work for which he was employed

and his presence at the job site the following day to retrieve his tools had no connection with the construction work at the site. In other words, once plaintiff's job was complete, he was no longer "employed" or engaged in a protected activity. (*See Torres v Perry St. Dev. Corp.*, 104 AD3d 672, 674 [2d Dept 2013] [defendants raised triable issue of fact when their witness testified that plaintiff was present at job site in street clothes to pick up paycheck when injured]; *cf. Lynch v 99 Washington, LLC*, 80 AD3d 977, 978 [3d Dept 2011] [section 23-1.7(f) of Industrial Code inapplicable where "[a]t the time of the accident, plaintiff was not performing any work; rather, he had entered the trailer to return his tools, put away his safety harness, and sign his time sheet because he was leaving the job site for the day"]). Thus, plaintiff's proposed Labor Law § 241(6) claim is palpably insufficient. (*See Singh v Deopaul*, 8 Misc 3d 1019[A], 2005 NY Slip Op 51196[U], *3-4 [Sup Ct, Kings County 2005] [plaintiff's EBT revealed his proposed Labor Law §§ 240 and 241 claims devoid of merit as he admitted he had not been hired to perform work when accident occurred]). Given this determination, I need not reach whether 12 NYCRR 23-1.7(e)(1) is applicable to the facts of the case.

3. RXR Realty LLC

Defendants neither allege substantial prejudice nor cite authority for the proposition that the completion of party depositions precludes the addition of RXR, an undisputed agent of Broadway. (*See McFarland v Michel*, 2 AD3d 1297, 1299 [4th Dept 2003] [lateness alone not barrier to amendment, where motion made within one week of filing note of issue and within 1-½ years of filing of complaint]; *see also Forty Cent. Park S., Inc. v Anza*, 130 AD3d 491, 491 [1st Dept 2015] [that additional discovery may be required upon addition of party does not constitute prejudice]).

III. MOTION FOR AN EXTENSION

As the deadline to file a note of issue expired during the pendency of these motions, and given that the addition of RXR may necessitate additional discovery, the deadline to file a note of issue is extended 90 days. (CPLR 2004).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to amend the complaint is granted in part, as follows: leave is granted to the extent of adding RXR Realty LLC as a defendant, and to this extent the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in this action; it is further

ORDERED, that leave to amend the complaint is denied with respect to the proposed second cause of action and that proposed cause of action is stricken; it is further

ORDERED, that a supplemental summons and amended complaint in the form annexed to the moving papers shall be served in accordance with the Civil Practice Law and Rules upon the proposed additional party in this action within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that upon said service, the action shall bear the following caption:

JOHN MURPHY,

Plaintiff,

- against -

JRM CONSTRUCTION MANAGEMENT, LLC, BROADWAY 340 MADISON FEE LLC, SUNGARD SYSTEMS INTERNATIONAL, INC., INTERCEPT INTERACTIVE, INC., d/b/a UNDERTONE, and RXR REALTY LLC,

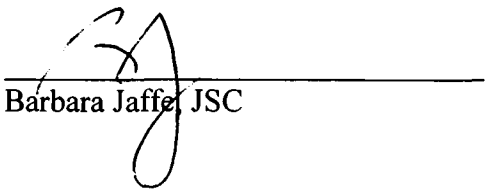
Defendants.

It is further

ORDERED, that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the additional party; and it is further

ORDERED, that the deadline for filing of the note of issue heretofore fixed for October 30, 2015 shall be extended by 90 days to January 30, 2015.

ENTER:



Barbara Jaffe, JSC

DATED: December 16, 2015
New York, New York