Foschi v Ramaekers & Kinnaman, LLC
2016 NY Slip Op 30529(U)
March 3, 2016
Supreme Court, New York County
Docket Number: 150696/13
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS Part 11

----------X Index No.: 150696/13

SANDRA FOSCHI,

Plaintiff,

-against-

RAMAEKERS & KINNAMAN, LLC, JOLIE Z. KELTER AND MICHAEL MALCE,

Defendants

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JOAN A. MADDEN, J.:

Plaintiff moves for leave to amend her complaint to include Robert E. Kinnaman & Brian A. Ramaekers, Inc. (hereinafter "Kinnaman & Ramaekers") as a defendant. Defendant Ramaekers & Kinnaman, LLC (hereinafter "Ramaekers") opposes the motion and cross moves to amend its answer to add the affirmative defense of "improper party."

Background

This action seeks to recover moneys for property damage sustained in a fire at plaintiff's condominium apartment on March 6, 2012. Plaintiff alleges that the fire was caused by a telescope lens known as a "Cape Canaveral Lens" that was purchased at defendants' antique store and given to plaintiff as a gift. The action was commenced on January 24, 2013, by filing of the summons and complaint. The affidavit of service indicates that Ramaekers was served on February 5, 2013, by service on the Secretary of State in accordance with Limited Liability Law section 303. Ramaekers served an answer, which did not contain an affirmative defense that it was not a proper party to sue. Defendants Jolie Z. Kelter and Michael Malce also served an answer.[1]

[1]The court records do not indicate that an answer was filed by any of the defendants.

On August 5, 2015, plaintiff took the deposition of Ramaekers, through its representative Brian Ramaekers. Mr. Ramaekers identified the business of Ramaekers as "the purchase and holding, rental and possible sale of real estate" (Ramaekers dep, at 11). He further testified that he is the secretary, president and sole owner of the Ramaekers. He also testified that entity identified on the receipt for the purchase of the lens, Kinnaman & Ramaekers, is a corporation that buys and sells antiques, and that Ramaekers "is separate entirely from that" (Id, at 12). As for the invoice attached to the receipt, which identifies Kelter-Malce, Mr. Ramaekers testified that he has no relationship with the antiques shop, except that Ramaekers owns the building where the shop is located and rents the space to the shop (Id, at 13). He also testified that he is currently the sole owner of Kinnaman & Ramaekers, which has been in business since 1977, and that Kinnaman & Ramaekers owned the lens before its sale (Id, at 15, 16). As for the reason that the sale was written up on a Kelter-Malce invoice, Mr. Ramaekers testified that Kinnaman & Ramaekers shares space with Kelter-Malce and another entity, and that someone from Kelter-Malce processed the sale and used a Kelter-Mace invoice instead one from Kinnaman & Ramaekers (17-19).

Following Mr. Ramaekers' deposition, plaintiff made this motion to amend the complaint to include Kinnaman & Ramaekers as a defendant, arguing that at no time prior to Mr. Ramaekers' deposition did Ramaekers disclose any information regarding the discrepancy between the defendant named in the complaint and the proper defendant, and did not assert an affirmative defense that plaintiff failed to name the proper party.

Ramaekers opposes the motion, arguing that the proposed amendment is without merit as the three-year statute of limitations has expired after the fire, or on March 12, 2015, and it is therefore too late to add Kinnaman & Ramaekers as a defendant. Moreover, it argues that

plaintiff should have been aware of the correct name since she testified at her deposition that she obtained the receipt, which displayed Kinnaman & Ramaekers in large letters, and based on Ramaekers' general denial of the allegations in the complaint in its answer. In addition, Ramaekers states that it is too late to amend since note of issue has been filed.

In reply, plaintiff argues that Ramaekers misled plaintiff during discovery by producing documentary discovery that would not be in the possession of the real estate entity and excluded the declaration page from an insurance policy produced during discovery which identified Kinnaman & Ramaekers as the insured.

Discussion

"Leave to amend a pleading should be 'freely given' (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise." Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). That being said, however, "in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." Eighth Ave. Garage Corp. v. H.K.L Realty Corp., 60 AD3d 404, 405 (1st Dept), lv dismissed, 12 NY3d 880 (2009). At the same time, leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not "palpably insufficient or clearly devoid of merit." MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted).

Here, the court finds that there is no prejudice based on the delay since Ramaekers does not deny that it understood which entity plaintiff intended to sue nor does it argue that additional discovery would be required in the event the proposed defendant was added as a party. Moreover, the amendment is proper as plaintiff alleges, and defendant does not deny, that in response to plaintiff's discovery demands, it produced the insurance policy for Kinnaman &

Ramaekers and excluded the name of the insured from the policy.

As for Ramaekers' argument that the claims against the new defendant would be untimely, it has no standing raise this issue as any affirmative defense relating to the statute of limitations must be raised by the party to whom such defense belongs. See Orix Financial Services, Inc. v. Haynes, 56 AD3d 377 (1st Dept 2008). When, as here, leave is sought to add a defendant, the proposed new defendant need not be served with notice of the motion. Eastern States Elec. Contractors, Inc. v. William L. Crow Const. Co., 153 AD2d 522 (1st Dept 1989). Since the proposed defendant is not yet before the court, it is not proper at this juncture to consider whether it may have a defense based on the statute of limitations. See Defillippo v. Knolls of Melville Redevelopment Co., 29 Misc3d 1228(A) (Sup Ct Suffolk Co. 2010)(noting that "as the person possessing a statute of limitations defense is not before the court because its joinder as a proposed new party defendant is part of the relief demanded by the plaintiff on its motion to amend, the court should not consider whether the plaintiff's new claims are exempt from a statute of limitations...").

With respect to Ramaekers' cross motion to amend its answer to assert that plaintiff has sued the wrong entity, it is denied as Ramaekers provides no explanation for its failure to plead this defense previously, and plaintiff has been prejudiced by the delay. See Brooks v. Robinson, 56 AD3d 406 (2d Dept 2008);Barbour v. Hospital for Special Surgery, 169 A.D.2d 385, 386 (1st Dept. 1991). In this connection, the court rejects Ramaekers' argument that its general denials in its answer were sufficient to put plaintiff on notice that it sued the incorrect entity, or that plaintiff should have been on notice of its error based on the receipt identifying the proper entity.

Conclusion

In view of the above, it is

ORDERED that plaintiff's motion to amend is granted and plaintiff shall serve the proposed summons and amended complaint within fifteen days of the date of this decision and order; and it is further

ORDERED that cross motion to amend by defendant Ramaekers & Kinnaman, LLC is denied.

DATED: March 3, 2016

HON. JOAN A. MADDEN
J.S.C.

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