

Yu Tian Li v Louie & Chan Rest.

2018 NY Slip Op 30631(U)

April 11, 2018

Supreme Court, New York County

Docket Number: 151760/2016

Judge: William Franc Perry

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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YU TIAN LI,

Plaintiff,

-against-

LOUIE AND CHAN RESTAURANT, SM 303
BROOM LLC, and 303 BROOME MANAGER LLC,

Defendants.
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Index No. 151760/2016

Mot. Seq. Nos. 002, 003

DECISION & ORDER

W. FRANC PERRY, J.S.C.:

Motion sequence numbers 001, 002 and, 003 are consolidated for disposition.

Plaintiff YU TIAN LI (Plaintiff) brings this action to recover damages relating to injuries allegedly sustained when she tripped over a pair of cellar doors that opened, without warning, on the sidewalk outside the property located at 303 Broome Street, New York, NY 10002, in April of 2014. The three-count amended complaint, dated January 22, 2018, asserts a separate cause of action for negligence against each of the three defendants.

By decision and order, dated September 26, 2017, Justice Richard F. Braun granted Plaintiff's motion, motion sequence number 001, to consolidate this action (Action One) with a related action entitled *Yu Tian Li v. SM 303 Broom, LLC*, Index No. 153272/2017 (Action Two).

Now, Plaintiff moves in motion sequence number 003, pursuant to CPLR 3025, for an order granting leave to file the supplemental and amended summons and complaint (NYSCEF Doc. No. 46), which was served on defendants LA GENTE, LLC, d/b/a LOUIS AND CHAN RESTAURANT, s/h/a LOUIE AND CHAN RESTAURANT (LCR), SM 303 Broom LLC (SMB), and 303 Broome Manager LLC (BM) (collectively, Defendants) on January 22, 2018.

Also pending before the Court in motion sequence number 002 in Action One is defendant LCR's motion, pursuant to CPLR 3025, for leave to assert cross-claims against co-defendants SMB and BM and, in motion sequence number 001 in Action Two, SMB and BM's pre-consolidation motion to dismiss Plaintiff's complaint in Action Two.

Background

Defendants LCR, SMB, and BM are the alleged owners, operators, lessors and/or lessees responsible for maintenance and repair of the property located at 303 Broome Street, New York, New York 10002 in Manhattan (the Property).

Plaintiff commenced Action One on March 2, 2016 by filing a summons and complaint against LCR, alleging, *inter alia*, personal injuries sustained as a result of Plaintiff being "caused to fall" on April 9, 2014 due to a "dangerous and defective condition[s]" at the Property.

While Action One was pending, on April 7, 2017, Plaintiff commenced Action Two against defendants SMB and BM by filing a summons and complaint alleging, *inter alia*, that the personal injuries sustained by Plaintiff's on April 9, 2014 were actually the result of a "slip and fall" in the "parking lot" at the Property due to SMB and BM's alleged negligence in failing to remedy unspecified "dangerous [and] defective conditions."

During discovery, defendants SMB and BM later learned, in August of 2017, that, contrary to Plaintiff's allegations in the complaint in Action Two, Plaintiff's injuries were sustained on the sidewalk at the Property when Plaintiff's right foot was struck by a pair of opening cellar doors, which caused Plaintiff to trip and fall. On this basis, SMB and BM moved, on September 14, 2017, to dismiss the complaint in Action Two for failure to state a claim, insofar as it contained factual allegations that were flatly contradicted by the evidence, which established that Plaintiff did not slip and fall in any parking lot.

Prior to the return date of Defendants' motion to dismiss, on September 28, 2017, SMB and BM received notice of Justice Braun's September 26, 2017 order granting Plaintiff's motion sequence 001 in Action One and consolidating Action One and Action Two. Thereafter, on November 2, 2017, Justice Kathryn E. Freed, to which Action Two had been assigned, issued an order disposing of Action Two and referring SMB and BM's motion to dismiss to Justice Braun.

After the consolidation and disposition of Action Two, on November 8, 2017, defendant LCR moved in motion sequence 002, pursuant to CPLR 3025, for leave to amend its answer to assert cross-claims against its new co-defendants, SMB and BM.

Now, Plaintiff moves in motion sequence 003, pursuant to CPLR 3025, for an order granting leave to file the supplemental and amended summons and complaint that was served on Defendants on January 22, 2018 (the Amended Complaint).

Discussion

Plaintiff's Motion to Amend the Complaint

Plaintiff moves in motion sequence 003, pursuant to CPLR 3025, for an order granting leave to serve and file the Amended Complaint.

"Pursuant to CPLR 3025(b), leave to amend a pleading should be freely given unless it would result in prejudice or surprise or the amendment is palpably improper or insufficient." (*Gelita, LLC v. 133 Second Ave., LLC*, 42 Misc. 3d 1216[A], *8, 984 N.Y.S.2d 631 [Sup Ct NY County 2014] [Kornreich, J.]). The decision to allow or disallow the amendment is committed to the discretion of the trial court (*Id.*, citing *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 958-59 [1983]; see also *Hypertronics Inc. v. Digital Equip. Corp.*, 159 A.D.2d 607, 607-09 [2d Dep't 1990] ["sound discretion"]).

Here, Plaintiff's Proposed Amended Complaint seeks to remove certain allegations that Plaintiff's injuries were sustained in the parking lot at the Property. The Proposed Amended Complaint, which was served on Defendants via NYSCEF on January 22, 2018 (NYSCEF Doc. No. 46), also operates to consolidate Plaintiff's allegations in its initial complaint against LCR in Action One and Plaintiff's allegations in its initial complaint in Action Two against SMB and BM. To that end, the Proposed Amended Complaint contains three claims for negligence, one against each of the three Defendants, based on, *inter alia*, Defendants' alleged ownership of the Property.

Contrary to Defendants' arguments in opposition to Plaintiff's motion to amend, the Proposed Amended Complaint does not allege any new theories of recovery based on facts that are not contained in either of the initial complaints filed in Action One and Action Two. Moreover, Defendants are not prejudiced by the proposed amendments, which seeks principally to remove references to the parking lot at the Property and to add a factual allegation already contained in Plaintiff's verified bills of particulars, and discussed at Plaintiff's deposition, that the subject accident was a trip and fall that occurred on the sidewalk at the Property which was allegedly caused by cellar doors opening, without warning, and striking the Plaintiff's right foot.

Accordingly, Plaintiff's motion to amend is granted.

LCR's Motion to Dismiss the Complaint

Also before the court is Defendant LCR's pre-consolidation motion, pursuant to CPLR 3211(a)(7), in motion sequence 001 in Action Two, to dismiss Plaintiff's complaint in that action for failure to state a cause of action.

On a motion to dismiss pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action.

of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff[s] ... ‘the benefit of every possible favorable inference’” (*AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 591 [2005], quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87 [1994]). “Whether the plaintiff ‘can ultimately establish [its] allegations is not part of the calculus in determining a motion to dismiss’” (*J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334 [2013], quoting *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). “Courts may consider affidavits submitted in opposition to such a motion to cure any defects in the complaint” (*Torok v. Moore's Flatwork & Founds., LLC*, 106 A.D.3d 1421, 1421 [2013]; see also *Sargiss v. Magarelli*, 12 N.Y.3d 527, 531 [2009]).

Here, there are ample allegations in the pleadings and assertions in Plaintiff’s affidavits to avoid CPLR 3211(a)(7) dismissal of Plaintiff’s cause of action for negligence against LCR. Plaintiff’s concession that he never slipped and fell in any parking lot, which is the principal grounds for LCR’s motion to dismiss, is simply not a basis to reject the Proposed Amended Complaint. Rather, the proposed amendments seek to conform the operative pleading with the separate complaints in Action One and Action Two, the allegations in Plaintiff’s bills of particulars, and the statements made by Plaintiff at his depositions.

Accordingly, Defendant LCR’s motion to dismiss is denied, without prejudice.

SMB and BM’s Motion to Amend its Answer

In light of this court’s granting Plaintiff’s motion for leave to serve and file the Proposed Amended Complaint, Defendant SMB and BM’s motion for leave to amend its answer to assert cross-claims against co-defendant LCR is denied as moot.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that the Plaintiff's motion (motion sequence 003) for leave to amend the complaint herein is granted, and the amended complaint in the proposed form (NYSCEF Doc. No. 46) shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Defendants shall serve an answer to the amended complaint or otherwise respond thereto within 30 days from the date of said service; and it is further

ORDERED that Defendant LCR's motion (motion sequence 001 in 153272/2017) to dismiss the complaint is denied, without prejudice; and it is further

ORDERED that Defendant SMB and BM's motion to amend their answer to assert cross-claims against Defendant LCR is denied as moot; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 307, 80 Centre Street, on June 12, 2018, at 9:30 AM.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

Dated: April 11, 2018
New York, New York

SO ORDERED:



HON. W. FRANC PERRY, J.S.C.