Alam v City of New York
2018 NY Slip Op 33071(U)
November 29, 2018
Supreme Court, New York County
Docket Number: 451193/2015
Judge: Verna Saunders

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART** **IAS MOTION 5**

Justice

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INDEX NO. 451193/2015
MOTION SEQ. NO. 002

FEROZ ALAM,

Plaintiff,

- v -

THE CITY OF NEW YORK
and MICHAEL WOLKWITZ,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for **AMEND**.

Plaintiff commenced this action seeking to recover for injuries sustained from a claimed battery and false arrest when he was allegedly attacked by Emergency Medical Services worker Michael Wolkwitz. Plaintiff moves pursuant to CPLR 305 and 1024 seeking to amend its Summons and Verified Complaint to add Saint Luke's Roosevelt Hospital Center a/k/a Mount Sinai St. Luke's and Mount Sinai West (collectively hereinafter "St. Luke's") as a defendant notwithstanding the expired statute of limitations on the ground that the relation back doctrine is applicable. In addition, plaintiff seeks an Order deeming service of the Supplemental Summons and Verified Complaint to be related back to the date of the original claims; permitting service of the proposed Supplemental Summons and Verified Complaint; and for an Order estopping defendant, The City of New York ("City") from denying that defendant, Michael Wolkwitz was its employee and/or acting at the behest of, and as an agent of, the City.

In support of its motion, plaintiff argues that the City, in bad faith, delayed providing pertinent information that defendant Michael Wolkwitz was not employed by the City. Plaintiff claims that the City's deposition witness, Alexis J. Castilla testified on October 21, 2015, that

defendant Michael Wolkwitz, who has defaulted in this action, was not employed by the City, but "possibly" by St. Luke's Hospital. Plaintiff avers that the City delayed in providing this information until after the statute of limitations expired. Further, plaintiff asserts that the relation back doctrine applies as the new party is united in interest with the City and it is undisputed that the claims arise out of the same occurrence. Lastly, plaintiff asserts that St. Luke's knew or should have known that an action would have been brought against it as they employed the defendant who assaulted plaintiff.

The City opposes the motion arguing that plaintiff's request for estoppel should be denied inasmuch as plaintiff failed to diligently prosecute his action and failed to name an indispensable party. The City further avers, nonetheless, that in its Answer it denied the allegation that defendant, Michael Wolkwitz was an employee of the City and then, specifically stated in its response to plaintiff's motion to strike, that Michael Wolkwitz was not a City employee, but might be employed by St. Luke's. Finally, the City avows that any assertion that St. Luke's and the City are united in interest is erroneous.

The doctrine of equitable estoppel is an extraordinary remedy and it is appropriate where the circumstances are such as to render it unconscionable to deny the promise upon which a plaintiff has relied and it would be unjust to allow a defendant to assert certain defenses like statute of frauds or statute of limitations. (*See (Matter of Hennel, 29 NY3d 487 [2017]; Zumpano v Quinn, 6 NY3d 666 [2006].)* It applies in limited situations where a plaintiff demonstrates that subsequent and specific actions by a defendant in some manner prevented the plaintiff from timely filing an action. (*Putter v N. Shore Univ. Hosp.*, 7 NY3d 548 [2006].) Also, it is appropriate when a plaintiff is prevented from filing an action within the applicable statute of limitations due to a plaintiff's reasonable reliance on a defendant's deception, fraud, or misrepresentation. (*Id.*)

Here, plaintiff has failed to establish that the City was the source of any deception, fraud, misrepresentation or even any misinformation for that matter. To the contrary, the City met its

obligation of notifying plaintiff that its co-defendant was not employed by the City in its Answer to the Summons and Complaint, during discovery, and as part of the motion practice which ensued prior to the instant motion. The obligation of locating any and all potential defendants including the employer of defendant Michael Wolkwitz has remained with plaintiff. Accordingly, plaintiff's request for estoppel is denied.

Pursuant to CPLR § 3025(b), the court has discretion to grant leave to amend pleadings at any time and such leave shall be freely given upon such terms as may be just. (*Fahey v County of Ontario*, 44 NY2d 934 [1978]). Such leave to amend shall be freely given in the absence of prejudice or surprise, unless it is palpably insufficient or patently devoid of merit. (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). Further, under CPLR 203 when specific circumstances are present an amendment to a complaint may relate back to the date of the original complaint notwithstanding the statute of limitations. In *Brock v Bua* (83 AD2d 61 [2d Dept 1981]) the court created a three-prong test to determine when the relation back doctrine is applicable. (*See also Mondello v NY Blood Ctr.*, 80 NY2d 219 [1992]). Under this test the court is to consider whether "both claims arose out of the same conduct, transaction, or occurrence; whether the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and whether the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well." (*Mondello*, *supra*). All three elements must be met for the statutory relation back remedy to be operative. (*Id.*)

Here, as plaintiff's claim that the City purposely misled plaintiff as to who employed Mr. Wolkwitz defendant's is unavailing, there is no basis upon which to conclude that the City and St.

Luke's are united in interest. As argued in opposition, the contention that St. Luke's and the City are united in interest is without merit as the nature of the claims against the City, to wit: false arrest and malicious prosecution are dissimilar from the claims against St. Luke's for assault, battery, and negligent hiring and retention. Further, the City maintains that despite its agreement with St. Luke's, which includes an indemnity clause, the City has no control over the operations of the hospital and maintains no vicarious liability for St. Luke's employees. The court concurs with the City's contention that plaintiff's assertions regarding St. Luke's and the City are based on a misapplication of the law. Even assuming *arguendo* that plaintiff claimed that the St. Luke's-Michael Wolkwitz relationship appropriately triggered application of the relation back doctrine, even that relief would not lie as the statement that St. Luke knew or should have known about the incident and would not be prejudiced by the amendment is conclusory, at best. As such, it is hereby

ORDERED that plaintiff's motion is denied in its entirety; and it is further

ORDERED that the parties shall appear for a compliance conference on March 19, 2019 at 2:00 P.M., Part DCM, Room 103, 80 Centre Street, New York, New York.

November 29, 2018

HON. VERNA L. SAUNDERS, JSC

CHECK ONE:	[ ]	**CASE DISPOSED**		[X]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[X] **DENIED**	[ ]	**GRANTED IN PART**	[ ]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**