

Nunez v 962 Third Ave. Assoc. LLC
2019 NY Slip Op 31967(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 160310/2017
Judge: Robert D. Kalish
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 160310/2017

JUAN NUNEZ,

MOTION DATE 07/02/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

962 THIRD AVENUE ASSOCIATES LLC, NOUVEAU
ELEVATOR INDUSTRIES, INC., and UNITED ELEVATOR
CONSULTANTS, INC.

**DECISION + ORDER ON
MOTION**

Defendants.

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NYSCEF Doc Nos. 35-42¹ were read on this motion for leave to amend the complaint.

Motion by Plaintiff pursuant to CPLR 3025 (b) to amend the complaint is granted as follows.

BACKGROUND

On November 28, 2018, this Court issued a decision and order granting Plaintiff's unopposed motion in seq. 001 pursuant to CPLR 3025 (b) for leave to amend the complaint to add 150 East 58TH Street LLC ("150") and United Elevator Consultants, Inc. ("United") as party defendants. On January 18, 2019, counsel for defendant 962 Third Avenue Associates LLC ("962") e-filed a fully executed stipulation discontinuing the action as against 150 without prejudice.

In the instant motion, Plaintiff again seeks to amend the complaint, now to add Vornado Office Management, LLC ("Vornado") as a party defendant based upon Plaintiff's recent discovery, at the May 29, 2019 deposition of 962, that Vornado was the sole entity responsible for the management and daily operations of the subject building, including the elevators, where it is alleged in the instant action that Plaintiff sustained an injury from a rapidly closing elevator door due to the negligence of Defendants.

Plaintiff annexes a proposed second supplemental summons and second amended complaint to his motion as exhibit A. The proposed amended pleadings add Vornado to the caption as a party defendant in this negligence action.²

¹ The opposition papers, at NYSCEF document number 38 and 39, were e-filed to motion sequence number 001. This is motion sequence number 002. The Court will disregard this as a mere irregularity and has read the papers.

² The Court notes that 150 remains listed both in the caption and in the body of the proposed pleadings as a party defendant. Insofar as the parties discontinued the action as against 150 without prejudice and the instant motion does not seek leave to bring it back in, the Court will disregard the inclusion of 150 in the proposed pleadings as a mere irregularity.

962 opposes, indicating, in the bare affirmation of counsel, that Vornado is not the owner of the property and therefore not a proper party, and that Plaintiff has not established how Vornado could be responsible for the alleged incident. 962 further argues that the parties have “known about Vornado as the contracts with the co-defendant Nouveau had been exchanged months ago.” (Affirmation of Wilder ¶ 3.)

In reply, Plaintiff submits the 962 EBT transcript and a Professional Vertical Transportation Consulting Service Agreement (the “Agreement”) by and between United and Vornado revised March 2013. Plaintiff argues that he learned at the EBT that the subject premises are owned by 962 and are under a long-term lease to Vornado. Plaintiff further argues that it did not receive the Agreement until June 6, 2019, and that it referred to Vornado as “Owner/Management.” Plaintiff then argues that it promptly filed the instant motion four days after receiving the contract identifying Vornado as the manager of the subject building.

DISCUSSION

CPLR 3025 provides

“(b) Amendments and supplemental pleadings by leave. A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.”

“As a general rule, leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . . , and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court.” (*Davis v South Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *see also Y.A. v Conair Corp.*, 154 AD3d 611, 612 [1st Dept 2017] [holding that leave should be granted “absent prejudice or surprise resulting therefrom”].) “[P]laintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010] citing *Lucido v Mancuso*, 49 AD3d 220 [2d Dept 2008].)

Here, based on the papers submitted, the Court finds that the proposed addition of Vornado as a party defendant is not palpably insufficient or clearly devoid of merit. Contrary to 962’s contentions, Plaintiff need not establish the merit of its proposed new allegations. (*See Hickey v Kaufman*, 156 AD3d 436, 436 [1st Dept 2017].) It is enough for the purposes of the instant motion that, as the manager of the subject premises, Vornado may have caused, created, or had actual or constructive notice of a dangerous condition that proximately caused injury to Plaintiff. As to 962’s contention that the parties have known about Vornado for months, although Plaintiff argues he learned about the material role of Vornado from the May EBT and the Agreement received from United in June, the parties’ knowledge of Vornado as conceded by 962

weighs in favor of granting the motion, as such knowledge supports a finding that there will not be “prejudice or surprise resulting therefrom.” (Y.A. at 612.)

As the proposed amended pleadings still list 150 as a party defendant, this Court will not deem the proposed amended pleadings interposed on the current party defendants as annexed. Rather, Plaintiff must make the necessary changes to remove 150 from the pleading and serve it on Defendants. As to the current party defendants, service of the second supplemental summons and second amended complaint shall be permitted by e-filing them to NYSCEF. As to Vornado, Plaintiff must serve it per the CPLR.

CONCLUSION

Accordingly, it is

ORDERED that the motion is granted to the extent that it is

ORDERED that Plaintiff Juan Nunez may serve a second supplemental summons and second amended complaint adding Vornado Office Management, LLC as a party defendant in the form annexed to this motion, except that 150 East 58TH Street LLC must be removed from the pleading in all respects, as it is not a party defendant; and it is further

ORDERED that Plaintiff shall file the second supplemental summons and second amended complaint within five days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the newly filed second supplemental summons and second amended complaint shall be deemed served upon defendants 962 Third Avenue Associates LLC, Nouveau Elevator Industries, Inc., and United Elevator Consultants, Inc. as of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that defendants 962 Third Avenue Associates LLC, Nouveau Elevator Industries, Inc., and United Elevator Consultants, Inc. shall answer or respond to the second amended complaint within 30 days of its service upon them; and it is further

ORDERED that Plaintiff shall serve new party defendant Vornado Office Management, LLC with process per the CPLR within 20 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that defendant Vornado Office Management, LLC shall answer or respond to the second amended complaint per the CPLR; and it is further

ORDERED that the action shall bear the following caption:

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JUAN NUNEZ,

Plaintiff,

Index No.: 160310/2017

- against -

962 THIRD AVENUE ASSOCIATES LLC.,
NOUVEAU ELEVATOR INDUSTRIES, INC.,
UNITED ELEVATOR CONSULTANTS, INC., and
VORNADO OFFICE MANAGEMENT, LLC,

Defendants.
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And it is further

ORDERED that Plaintiff shall serve a copy of this order with notice of entry on all parties, on the Clerk of the Trial Support Office (Room 158M), and on the County Clerk—along with a completed “EF-22, Notice to County Clerk – CPLR § 8019(c),” e-filed under category “Non-Motion Documents>Documents not related to a motion/petition/OSC” with a “Document Type” of “Notice to County Clerk CPLR 8019(C)”—within 10 days of the NYSCEF filing date of the decision and order on this motion; and it is further

ORDERED that the County Clerk and the Clerk of the Trial Support Office shall amend their records to reflect the change in the caption described herein; and it is further

ORDERED that the July 16, 2019 status conference is adjourned; and it is further

ORDERED that all parties in the newly captioned matter of *Nunez v 962 Third Ave. Assocs., Nouveau El. Indus., Inc., United El. Consultants, Inc., and Vornado Office Mgt., LLC* are directed to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, September 24, 2019, at 9:30 a.m., for a status conference.

The foregoing constitutes the decision and order of the Court.


7/8/2019
DATE

CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION

APPLICATION: GRANTED DENIED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE


HON. ROBERT D. KALISH, J.S.G.