Lechner-Zelman v Consolidated Edison of New York, Inc.
2019 NY Slip Op 32205(U)
July 25, 2019
Supreme Court, New York County
Docket Number: 159144/2018
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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BONNIE LECHNER-ZELMAN,

Plaintiff,

- v -

CONSOLIDATED EDISON OF NEW YORK, INC.,GREY-RUSO CONSTRUCTION CORP., KNS BUILDING RESTORATION INC.,OESTREICHER CONSTRUCTION CORPORATION, TC SYSTEMS, INC.,JOHN DOE 1 CORPORATION OR ORDER ORGANIZED ENTITY, JOHN DOE 2 CORPORATION OR ORDER ORGANIZED ENTITY

Defendants.

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INDEX NO. 159144/2018

MOTION DATE

MOTION SEQ. NO. 001, 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 38, 58, 59, 60, 61, 62, 63, 80

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 40, 64, 65, 66, 67, 68, 69, 81

were read on this motion to/for DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79

were read on this motion to/for DISMISSAL

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

In motion sequence 001, defendant Grey-Ruso's motion to dismiss is granted.

In motion sequence 002, the branch of defendant TC Systems, Inc.'s ("TC") motion to dismiss is granted. The branch of the motion for costs associated with the motion is denied.

In motion sequence 003, defendant KNS Building Restoration, Inc.'s ("KNS") motion to dismiss is granted.

Background

On October 2, 2015, plaintiff allegedly suffered injuries after a trip and fall at the intersection of West 61st St. and Broadway in Manhattan. She filed a timely Notice of Claim on December 15, 2015 and then filed suit against the Department of Transportation in 2016.

On October 2, 2018, the last day before the three-year statute of limitations would expire, plaintiff commenced this negligence action against defendant ConEdison and six "John Doe Corporations or Other Organized Entities." On December 4, 2018, plaintiff and ConEdison entered into a So-Ordered stipulation allowing plaintiff to replace the John Doe defendants with defendants Grey-Ruso, KNS, Ostreicher Construction Corporation, and TC. On that same day, plaintiff filed an amended complaint naming these parties.

Defendants Grey-Ruso, KNS, and TC bring motions to dismiss the case as time-barred pursuant to the three-year statute of limitations for negligence actions (the statute of limitations expired on October 3, 2018 and plaintiff named defendants as parties to the action on December 4, 2018). They claim that plaintiff did not conduct due diligence in determining defendants' identities prior to the expiration of the statute of limitations.

Plaintiff insists that the action is not time-barred because she named these defendants as John Doe defendants and exercised due diligence in ascertaining their identities prior to the expiration of the statute of limitations. She also claims that the relation-back doctrine prevents her claims from being time-barred because all named defendants are united in interest with ConEdison, a party over whom jurisdiction was timely obtained.

Discussion

John and Jane Doe Defendants

CPLR § 1024 states:

> "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly"

"A condition for commencing an action against an unknown party . . . is that the plaintiff demonstrate he or she made a genuine effort to ascertain, in a timely manner, the identity of the defendants prior to expiration of the statute of limitations" (*Opiela v May Indus. Corp.*, 10 AD3d 340, 781 NYS2d 353 [1st Dept 2004]). Here, plaintiff sued ConEdison on the last day of the statute of limitations, and while she does not state it, it appears that ConEdison provided the information about the identity of the "Doe" defendants. Obviously, this was done after the statute of limitations expired.

In *Temple v New York Cmty. Hosp.*, 89 AD3d 926, 927–28, 933 NYS2d 321 [2nd Dept 2011], the Court held that plaintiff did not exercise due diligence to discover the identity of the John Doe defendants because there was no indication that plaintiff engaged in "pre-action discovery or Freedom of Information Law [Public Officers Law article 6] requests. Further, while some limited discovery demands were served prior to the expiration of the statute of limitations, when the responses received were less than adequate, the plaintiff failed to promptly seek further discovery, neglected to submit a properly executed authorization to the disclosing party, and failed to properly and promptly seek assistance from the Supreme Court."

To replace a "John Doe" defendant with the correct party, plaintiff had to show that she made genuine efforts to identify the defendants before the statute of limitations expired. Here,

plaintiff's attempts at doing so were minimal. The only action she took before the statute of limitations expired was making one FOIL request in 2017. While plaintiff emphasizes that she never received a response to the request, there is also no indication that she ever tried to follow up, make further requests, or bring an Article 78 proceeding to compel a response to the FOIL request. She claims that "several inquiries [were] made, including the creation of a stipulation thereof with originally named defendants to ascertain which further parties may be involved" (NYSCEF Doc. No. 58 at ¶ 43). However, she does not indicate what inquiries were made and to whom, and the stipulation itself does not constitute an inquiry. Plaintiff had an opportunity to conduct discovery in connection with the 2016 case against the Department of Transportation and could have taken efforts to identify the current defendants. Plaintiff did not show that she did so. Simply making one FOIL request to which there was no response does not constitute due diligence prior to the expiration of the statute of limitations.

Relation-Back Doctrine

Under the relation-back doctrine, "a plaintiff must show that: (1) both claims arise out of the same transaction; (2) the new party is united in interest with the original defendant such that their respective defenses are the same and they stand or fall together; and (3) the new party knew or should have known that but for the mistake of the plaintiff in failing to identify all proper parties, the action would have been brought against him" (*Tucker v Lorieo*, 291 AD2d 261, 262, 738 NYS2d 33 [1st Dept 2002]). Plaintiff argues that the relation-back doctrine saves her claims from being time-barred. In response, defendants emphasize that this doctrine is not applicable because the parties are not united in interest with ConEdison.

"Unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Mercer v 203 E. 72nd*

St. Corp., 300 AD2d 105, 106, 751 NYS.2d 457 [1st Dept 2002]). Plaintiff has not alleged any facts which would suggest that one defendant is vicariously liable for another's actions.[1] In its reply papers, Grey-Ruso states that it is an independent contractor and thus vicarious liability cannot be established (NYSCEF Doc. No. 80 at ¶ 11). KNS also submits an affidavit testifying that it is not a corporate affiliate or agent of ConEdison (NYSCEF Doc. No. 79). And TC also submits an affidavit stating that it is a wholly-owned subsidiary of Teleport Communications America, LLC, which in turn is a wholly-owned subsidiary of AT&T Inc. and that there is no ownership relationship between TC and ConEdison (NYSCEF Doc. No. 28). Because there is no indication that the parties are vicariously liable, the parties are not united in interest on that basis.

Plaintiff further alleges that moving defendants are united in interest with ConEdison because they are joint tortfeasors. However, New York courts routinely hold that joint tortfeasors are not united in interest. First Department cases have adopted the holding in *Connell v Hayden*, 83 AD2d 30, 44, 443 NYS2d 383 [2d Dept 1981], where the court concluded, "With respect to persons whose only relationship is that of joint tort-feasors, the courts have held that they are not united in interest." *See also*, *LeBlanc v Skinner*, 103 AD3d 202, 210, 955 NYS2d 391 [2d Dept 2012], where the Court held, " [J]oint tortfeasors are generally not united in interest, since they frequently have different defenses, in that one tortfeasor usually will seek to show that he or she is not at fault, but that it was the other tortfeasor who is liable." Because the moving defendants are not united in interest by virtue of being joint tortfeasors, the second prong of the relation-back doctrine has not been established on this basis.

[1] Plaintiff claims that contractual obligations may exist between defendants and until discovery can be commenced, the scope of this relationship cannot be determined. If there is a contractual relationship between the defendants, ConEdison has the option of bringing third-party claims.

Summary

Because plaintiff did not conduct due diligence in determining defendants' identities prior to the expiration of the statute of limitations and because she fails to demonstrate the applicability of the relation-back doctrine, her claims against the moving defendants are time-barred. Because they are time-barred, the claims against defendants Grey-Ruso, TC, and KNS are severed and dismissed.

Accordingly, it is hereby

ORDERED that in motion sequence 001, defendant Grey-Ruso's motion to dismiss is granted; it is further

ORDERED that in motion sequence 002, the branch of defendant TC's motion to dismiss is granted. The branch of the motion for costs associated with the motion is denied; it is further

ORDERED that in motion sequence 003, defendant KNS's motion to dismiss is granted.

ORDERED that the claims against defendants Grey-Ruso, TC, and KNS are hereby severed and dismissed.

Conference with remaining parties: 9-12-19

7/25/19
DATE

ARLENE P. BLUTH, J.S.C.
HON. ARLENE P. BLUTH

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