Kostulias v City of New York
2019 NY Slip Op 33303(U)
November 4, 2019
Supreme Court, New York County
Docket Number: 154897/2015
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JAMES KOSTULIAS,

Plaintiff,

-against-

CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION, and VOLMAR CONSTRUCTION, INC.,

Defendants.

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CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION,

Third-Party Plaintiffs,

ACRON MAINTENANCE, INC. and EXCEL ELEVATOR & ESCALATOR CORP.,

Third-Party Defendants.

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DECISION AND ORDER
Index No.: 154897/2015
Motion Sequence 004

CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this Labor Law action, Plaintiff James Kostulias moves, pursuant to CPLR 203(f), for leave to add Third-Party Defendant Excel Elevator & Escalator Corp. ("Excel") as a direct defendant and to serve the Proposed Supplemental Summons and Amended Verified Complaint on that party. Plaintiff alternatively moves for the same under CPLR 3025(b) and 1003. Excel opposes the motion.

BACKGROUND FACTS

This motion stems from an action commenced by Plaintiff on May 15, 2015, against Defendants City of New City ("the City") and Volmar Construction, Inc. ("Volmar"), after Plaintiff suffered an accident after falling in an elevator shaft at a construction site at a public school in Brooklyn. The City impleaded Excel, the maintenance company in charge of oversight of the incident elevator, as a third-party defendant in June 2016 (NYSCEF doc No. 90, ¶ 20). During this time, Plaintiff was under the impression that Excel could not be liable for the accident as the subject elevator was inspected very rarely (*id.* at ¶ 25). During discovery, Plaintiff served various demands on Excel for maintenance records of the elevator. Excel did not comply with various court orders compelling disclosure, so the discovery process stretched well into 2019 (*id.* at ¶¶ 30-49).

Plaintiff alleges that as it only just learned the full extent of Excel's responsibilities regarding the subject elevator, he was left with no choice but to bring this motion after the statute of limitations to add a party expired. Plaintiff only recently obtained all requested discovery, including its contracts, work records, maintenance information, and insurance information. Plaintiff claims that under CPLR 203(f), he is allowed leave to add Excel as a direct defendant because Excel was originally served as a third-party defendant within the statute of limitations. Plaintiff also argues that the "relation-back" doctrine applies here, and Excel is liable as a direct defendant and not just as a third-party defendant. Plaintiff also asks that Excel be equitably estopped from raising the statute of limitations as an affirmative defense. Excel, in opposition, argues that Plaintiff had numerous opportunities throughout the last few years to bring this motion, and that despite Plaintiff's contentions regarding delay in discovery, Excel produced

various documents within the statute of limitations. Excel also argues the relation-back doctrine is inapplicable as Excel's interests are not aligned with those of Defendants in this action.

DISCUSSION

It is uncontested that the three-year statute of limitations applies to plaintiff's personal injury action (NYSCEF doc No. 90, ¶ 83). Thus, as plaintiff's accident allegedly occurred on March 23, 2015, the statute of limitations of his action expired on March 23, 2018.

It "has been held in all four Departments of this state that under certain circumstances CPLR 203(e) should be construed to allow the plaintiff to assert a claim against the third-party defendant, after the statute of limitations has expired, to relate back to the date of service of the third party complaint" (*Holst v Edinger*, 93 AD2d 313 [1st Dept.1983]; *Schuler v Grand Metro Bldg. Corp.*, 118 A.D.2d 633, [2d Dept. 1986]; *Jones v Gelles*, 125 AD2d 794 [3d Dept. 1986]; *Boxhorn v Alliance Imaging, Inc.*, 74 AD3d 1735 [4th Dept. 2010]).

As pointed out by Plaintiff, CPLR 203 [f] provides:

> Claim in amended pleading. A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

"It is evident that when a third party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time. The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose [due to the expiration of the statute of limitations]. Consequently, an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendant, which, for the

purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint" (*Duffy v Horton Mem. Hosp.*, 66 NY2d 473 [1985] citing McLaughlin, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, C203:11, p. 124; Siegel, N.Y. Prac. § 49, at 17–18 [1985 Supp.]; 6 Wright and Miller, Federal Practice & Procedure § 1498)).

In *Linares v Franklin Mfg. Corp.*, (155 AD2d 518 [2d Dept 1989]), the plaintiffs moved for leave to amend their complaint naming the third-party defendant Shore Plastics, Inc., as a defendant in the main action and "asserting a new theory of recovery based upon the alleged negligent modification of the injury-causing machine." The original complaint and the third-party complaint were timely served within the three-year Statute of Limitations. However, the new theory was asserted after the three-year Statute of Limitations expired. Nevertheless, and citing, *inter alia*, CPLR 203[e] [sic][1], the Court held that the plaintiffs' direct claim against the third-party defendant, was deemed for Statute of Limitations purposes "to have been interposed as of the date that the third-party complaint was served." The original pleadings together with the third-party pleadings and the plaintiffs' bill of particulars were served upon the third-party defendant and provided adequate notice of the transactions and occurrences out of which the new theory of recovery arises. The Court then applied CPLR 3025(b) because the third-party defendant failed to demonstrate any actual prejudice resulting from the plaintiffs' delay in seeking a retroactive amendment to add it as a defendant in the main action.

[1] CPLR 203 (e) concerns the "Effect upon defense or counterclaim of termination of action because of death or by dismissal or voluntary discontinuance."

Here, as the third-party action against Excel was timely filed in June 2016, well within the three-year statute of limitations, Plaintiff's direct claims against it are timely. The original pleading herein gives sufficient notice of the "transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." (CPLR 203[f]). It is also noted that Excel has failed to demonstrate sufficient prejudice caused by the amendment at this juncture. The First Department has observed that:

> "'The kind of prejudice required to defeat an amendment ... must ... be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.'"

Jacobson v Croman, 107 AD3d 644, 645 (1st Dept 2013); quoting *A. J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 (1st Dept 1983) (internal citations omitted).

Excel argues it would be prejudiced as its defenses thus far have focused on the claims of Defendants/Third Party Plaintiffs, not those raised by Plaintiffs. However, the causes of action raised both by Defendants and Plaintiff relate to negligent maintenance and a failure to perform services related to the accident area (NYSCEF doc No. 145, ¶ 6). Excel's defense in both the third-party action and the original complaint pertains to the same subject matter. Excel also was necessarily aware of Plaintiff's complaint when it was served the third-party action, as it raised cross-claims against Defendant Volmar and Co-Third-Party Defendant Acron Maintenance, Inc., as well as a Demand for a Verified Bill of Particulars from Plaintiff (*id.* at ¶ 7). The record reflects that Excel has had a full opportunity to participate in all pre-trial discovery, including conferences where it requested additional discovery from Plaintiff (*id.* at ¶ 10). Excel has also participated in depositions, which are still currently ongoing. The deposition of one of Excel's

representatives occurred less than a month before this motion was filed, and another representative's deposition remains outstanding (*id.* at ¶ 13). As discovery is still ongoing and Excel has continued to be an active participant in the process, Excel has not demonstrated why it would suffer any prejudice by now being added as a direct defendant.

Plaintiff further contends that adding Excel as a direct defendant is proper under the "relation back" doctrine. Courts in New York have established that claims against one defendant may be asserted against a new party or defendant when:

> "(1) both claims arose out of same conduct, transaction or occurrence, (2) 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 he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well."
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> (*Buran v Coupal*, 87 NY2d 173 [1995], citing *Brock v Bua*, 83 AD2d 61, 69 [2nd Dept. 1981]).

A plaintiff may amend a summons and complaint to add a new claim or a new party to an action at any time by leave of court under the relation back doctrine after the pertaining statute of limitations has run. "New York law requires merely a mistake on the part of the litigant seeking the benefit of the [relation back] doctrine." (*Buran*, 97 NY2d at 176). The relation back doctrine liberalizes strict, formalistic pleading requirements while "respecting the important policies inherent in statutory repose." (*Id.* at 177.) "The doctrine gives the Court 'sound judicial discretion,' to identify cases 'that justify the relaxation of limitations strictures . . . to facilitate decisions on the merits if the correction will not cause undue prejudice to plaintiff's adversary." (*Id.* at 177-178; see also *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985]; Lewis, *The*

Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision, 85 Mich. L. Rev. 1507, 1512 [1987]). The doctrine may be raised at any time during the proceeding.

Plaintiff argues that all three prongs of the *Buran* test are met here. Regarding the first prong, Plaintiff's claims against Excel clearly arise out of the same conduct, transaction, or occurrence stated in the third-party complaint, as all claims relate to the same accident in the elevator shaft owned by the City and maintained by Excel. Under the second prong, Excel is also united in interest with the City, as under an indemnity clause in the agreement between the City and Excel, Excel may be held liable for Plaintiff's injuries if the City is found negligent (NYSCEF doc No. 145, ¶ 19). The third-party complaint also states that Excel is liable should Plaintiff recover against Defendants (*id.*). Excel and the City thus have the same interest in establishing that their negligence was not the cause of Plaintiff's accident.

Regarding the third and final prong, Plaintiff only needs to prove that a "mistake was made in failing to sue the prospective defendant within the applicable time limitations." (See *Ramirez v Elias-Tejada*, 168 AD3d 401 [1st Dept. 2019]). A mistake does not need to relate to the identity of a party but can be in regard to the extent of a party's involvement in an accident (*id.*). A delay in information becoming available can suffice as reasonable grounds for the mistake of not amending a complaint earlier. Here, while Plaintiff was always aware of Excel's identity, the full scope of Excel's involvement regarding maintenance and control of the accident area did not become clear until recently (NYSCEF doc No. 145, ¶ 23). Excel did not produce an employee with actual knowledge of the inspection history of the area for deposition until July 2019, shortly before this motion was filed (*id.*). It was thus reasonable for Plaintiff to realize his mistake at this juncture in the proceedings and move for leave to amend the complaint. As

Plaintiff's amendment is proper under the relation-back doctrine and the original third-party complaint was served timely, the affirmative defense of the statute of limitations is inapplicable to Excel (*see Holst v Edinger*, 93 AD2d 313, 315-316 [1st Dept]).

Therefore, Plaintiff has demonstrated sufficient good cause for why Excel should be added as a direct defendant, notwithstanding the expiration of the statute of limitations, and Excel is precluded from raising the statute of limitations as an affirmative defense.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that Plaintiff's motion for leave of the Court to add Third Party Defendant Excel Elevator & Escalator Corp. as a direct party and to serve the annexed Proposed Supplemental Summons and Amended Verified Complaint is granted; and it is further

ORDERED that the service amended complaint is deemed to be made on all parties as of the date of this order and all parties to respond or otherwise move pursuant to the CPLR; and it is further

ORDERED that counsel for Plaintiff shall serve a copy of this decision, along with notice of entry, on all parties and the Trial Support Office (Room 158) within 10 days of entry; and it is further

ORDERED that the Clerk shall amend the caption to read as follows:

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JAMES KOSTULISAS,

Plaintiff,

-against-

CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION, VOLMAR CONSTRUCTION, INC., and EXCEL ELEVATOR & ESCALATOR CORP.,

Defendants.
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CITY OF NEW YORK, N.Y.C. DEPARTMENT OF EDUCATION,

Third-Party Plaintiffs,

ACRON MAINTENANCE, INC. and EXCEL ELEVATOR & ESCALATOR CORP.,

Third-Party Defendants.
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And it if further

ORDERED that upon receipt of a copy of this order, the Trial Support Office shall amend the caption accordingly.

Dated: November 4, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.