Joudeh v Mazzei
2021 NY Slip Op 33004(U)
December 7, 2021
Supreme Court, Richmond County
Docket Number: Index No. 101096/2014
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND: CIVIL TERM: IAS PART 26

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SAMIR JOUDEH,

Plaintiff,

-against-

JOANNE MAZZEI, SALVATORE BLANDA AND CRISTIN CURRY,

Defendants.

----------X

SALVATORE BLANDA AND CHRISTINE CURRY,

Third-Party Plaintiffs,

-against-

SW RIAD CORP.,

Third-Party Defendant.

----------X

SALVATORE BLANDA AND CHRISTINE CURRY,

Second Third-Party Plaintiffs,

-against-

SW JOANN'S DELI INC.,

Second Third-Party Defendant.

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Index No. 101096/2014

Motion Seq. 05, 06

ORDER AND DECISION

The following papers, numbered EF3 to EF18, EF62 to EF64, and EF74 to EF87, read on Defendants', SALVATORE BLANDA ("Blanda") and CRISTIN CURRY ("Curry") (together, "Defendants"), motion to strike plaintiff's amended verified bill of particulars, and for summary judgment in their favoring dismissing the complaint pursuant to CPLR 3212 (mot. seq. 05), as well as plaintiff's cross-motion for leave to amend his complaint and bill of particulars, pursuant to CPLR 3025, and to deny defendants' motion to strike his amended bill of particulars and for summary judgment (mot. seq. 06), have been considered along with the points raised by the parties during oral argument.

Papers Filed	Papers Numbered
Notice of Motion - Affidavits (Affirmations) – Exhibits (Seq. 05)_____	EF74-EF75
Notice of Cross-Motion - Affidavits (Affirmations) – Exhibits (Seq. 06)___	EF3-EF18
Answering Affidavit (Affirmation) – Exhibits_____	EF62-EF64
Reply Affidavit (Affirmation) – Exhibits_____	EF76-EF87

Upon the foregoing papers it is ordered that the defendants' motion and the plaintiff's cross-motion are determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on December 17, 2013, when it is alleged he slipped and fell on snow/ice at the defendants' premises located at 1373 Bay Street, Richmond, NY ("the premises").

The Parties' Arguments

Plaintiff alleged in his complaint and amended complaint that his accident occurred on the sidewalk adjacent to the premises. Plaintiff's bill of particulars ("BP") alleges the accident occurred in front of the premises. Plaintiff subsequently testified at his examination before trial ("EBT") that his accident occurred in the parking lot at the rear of the premises. Shortly after his EBT and the first EBT of defendant, Curry, the plaintiff served an amended BP, in which he alleged, *inter alia*, that his accident occurred in the parking lot at the back of the premises. Defendants rejected plaintiff's amended BP and thereafter moved for an order striking the same, and for summary judgment, alleging entitlement thereto because the amended BP contradicted the complaint and amended complaint, which in turn contradicted plaintiff's testimony. Defendants argued to strike the amended BP, claiming prejudice by having to accept the same, because of the plaintiff's delay in serving it, and because the statute of limitations ("SOL") had run.

Plaintiff then cross-moved for an order granting him leave to amend his complaint and, upon being granted leave, to deem the same, along with the amended BP, validly served upon defendants *nunc pro tunc*, and denying defendants' motion. In so doing, plaintiff argued that the proposed amendment would cause defendants no prejudice since the changed location of plaintiff's accident remains on defendants' same premises, plaintiff's theory of liability remains unchanged, and defendants were apprised of the transactions and occurrences giving rise to the claim by the original complaint and amended complaint. Plaintiff also argued he promptly sought to amend his BP following his EBT and, while the proposed change came several years following the commencement of the action, discovery was in its infancy and the note of issue has not been filed. Plaintiff further argued the proposed amendment was supported by merit via plaintiff's undisputed testimony concerning the location of his accident. Finally, plaintiff argued that, if the proposed amendment were permitted, defendants' application for summary judgment is rendered moot.

In opposing plaintiff's cross-motion, defendants argued plaintiff's proposed amendment is devoid of merit because the proposed change is sought after the expiration of the SOL, and defendants are prejudiced in their ability to investigate the accident due to the death of a known witness in 2016 or 2017. They also reiterated their argument of entitlement to summary judgment since the allegations in plaintiff's pleadings did not match plaintiff's testimony.

On reply, plaintiff argued that, after defendants filed their motion, four additional party EBTs had taken place, and both, plaintiff and defendant, Curry, appeared for additional EBTs. Plaintiff further argued that the passing of the SOL did not render his proposed amended complaint and BP devoid of merit; rather, plaintiff's undisputed testimony supported the merit thereof. Moreover, plaintiff argued that defendants' argument of prejudice is feigned and/or self-imposed as defendants have been aware of the correct location of plaintiff's accident prior to the lawsuit being filed, defendants knew to question the now allegedly deceased witness well prior to his death, and because plaintiff's theory of liability remains unchanged.

Discussion

It is undisputed that the location of plaintiff's accident, as testified to during his EBT, is a different location on defendants' premises than is alleged in his complaint, amended complaint, and BP. Thus, defendants' contention that the evidence adduced during discovery does not match plaintiff's pleadings is correct. It is also true that plaintiff's application for leave to amend his pleadings was first made after the expiration of the SOL pertaining to this case.

However, the mere fact that the SOL has run does not by itself render plaintiff's proposed amended complaint and BP palpably insufficient or clearly devoid of merit. See *Vidal v. Claremont 99 Wall, LLC*, 124 A.D.3d 767 (2d Dep't 2015). It is fundamental that "[l]eave to amend the pleadings 'shall be freely given' absent prejudice or surprise resulting directly from the delay." *McCaskey, Davies and Assocs., Inc. v. New York City Health & Hosps. Corp.*, 59 N.Y.2d 755, 757 (1983). While a motion to amend should be made at the earliest possible moment to avoid prejudice, such motions can be made as late as the eve of trial or on appeal in the absence of significant prejudice (*Burack v. Burack*, 122 A.D.2d 101 [2d Dep't 1986]). For a motion to amend a pleading to be denied, prejudice must be significant (*Edenwald Contracting Co., Inc. v. City of New York*, 60 N.Y.2d 957 [1983]), will not be presumed (*Santiago v. County of Suffolk*, 280 A.D.2d 594 [2d Dep't 2001]), and the burden of proof to establish prejudice explicitly lies with the party opposing the amendment (*Lennon v. 56th and Park (NY) Owner, LLC*, 199 A.D.3d 64 [2d Dep't 2021]). Moreover, mere lateness without significant prejudice is insufficient to deny the relief of a motion to amend a pleading (*Krakovski v. Stavros Associates, LLC*, 173 A.D.3d 1146 [2d Dep't 2019]), and, even where a delay in amending is "inordinate," this does not inherently preclude amendment (*Seda v. New York City Housing Authority*, 181 A.D.2d 469 [1st Dep't 1992]). Simply put, "[a] party opposing leave to amend 'must overcome a heavy presumption of validity in favor of [permitting amendment].'" *Cortes v. Jing Jeng Hang*, 143 A.D.3d 854 (2d Dep't 2016).

Where a party opposing an application for leave to amend a pleading argues prejudice, but presents no evidence as to what, if any, investigation it undertook and, therefore, how its investigation was hindered by the proposed amendment, such a party fails to adequately demonstrate prejudice. See, *Vidal v. Claremont 99 Wall, LLC*, 124 A.D.3d 767 (2d Dep't 2015); *Gonzalez v. New York City Housing Authority*, 107 A.D.3d 471 (1st Dep't 2013). It must also be considered where the condition complained of is transient in nature, such as snow and ice as is the case here, this inherently renders a defendant's ability to investigate minimal following even a short passage of time. *Cox v. City of Peekskill*, 297 A.D.2d 735 (2d Dep't 2002).

Here, plaintiff has demonstrated that his proposed amendment to his complaint and BP is not being made in bad faith, and seeks to correct the location of his accident, which remains on defendants' premises. Defendants, while arguing prejudice, have failed to demonstrate what specific efforts they undertook to investigate the accident and therefore how their investigation was hindered. It also appears that defendants could have ascertained the correct location of plaintiff's accident with minimal effort (see *Vidal v. Claremont 99 Wall, LLC*, *supra*, at 768), to the extent they were not explicitly aware of it before this action was filed. Defendant, Blanda, testified to having awareness of the plaintiff's accident within 2-3 weeks thereafter, and was aware that the now apparently deceased witness, John Lovetro, had knowledge pertaining to the accident and the location where it occurred within the same timeframe. However, defendants failed to question this witness, who lived on defendants' premises, during the years prior to his death and after this litigation was commenced. Defendant, Curry, also wrote notes on a copy of the applicable lease indicating the correct location of the plaintiff's accident, which were in defendants' possession no later than October, 2015, and likely earlier, and which information she learned from a conversation between defendant, Blanda, and second third-party defendant, SW JOANN'S DELI INC.'s, witness, Wael Joudeh. Plaintiff also worked in the same deli where Wael Joudeh worked on defendants' premises, and they did not question him about his accident before this action was commenced despite being able to. Defendants also failed to timely make any efforts to depose the EMTs who found the plaintiff where he fell despite being in possession of the ambulance call report, which listed the location of plaintiff's accident, since 2015[1]. Moreover, the defendants never presented any efforts showing they sought to depose Kim, the employee of the deli located on their premises, who was apparently present when plaintiff's accident occurred.

Under these circumstances, it cannot be said that any prejudice to defendants, to the extent any exists, is traceable to the plaintiff's proposed amendment of his complaint and BP. See *Wyso v. City of New York*, 91 A.D.2d 661 (2d Dep't 1982) ("prejudice sufficient to defeat an amendment must be traceable 'to the omission from the original pleading of whatever it is the amended pleading wants to add").

Moreover, whether plaintiff's accident occurred on the sidewalk adjacent to defendants' premises or in the back parking lot that was undisputedly part of defendants' same premises, the obligation to keep both areas in a reasonably safe condition was defendants' alone. See *Xiang Fu He v. Troon Management*, 34 N.Y.3d 167, 174 (2019); *Peralta v. Henriquez*, 100 N.Y.2d 139 (2003). Thus, plaintiff's proposed amendment does not alter the defendants' potential liability in this matter.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853 (1985). Here, defendants' motion for summary judgment is predicated less upon an evidentiary showing so as to eliminate all questions of fact but, rather, is premised on the contradiction between plaintiff's pleadings and his testimony as they pertain to the location of his accident on defendants' premises. If plaintiff is not permitted to amend his pleadings, it is axiomatic that his testimony

[1] The Court notes that Defendants e-filed requests to have subpoenas to depose these EMTs so-ordered on October 6, 2020 (EF66-67), and again on November 30, 2021 (EF 88-89). Both of these efforts come at least five years after this action was filed.

cannot be reconciled with the allegations in his pleadings. However, given the foregoing analysis of plaintiff's cross-motion, in light of the absence of prejudice to the defendants, and considering the policy of this jurisdiction to resolve actions on their merits whenever possible (*O.K. Petroleum Intl., Ltd. V. Palmieri & Castiglione, LLP*, 136 A.D.3d 767 [2d Dep't 2016]), it is ordered that defendants' motion is denied and plaintiff's cross-motion is granted.

Accordingly, it is

ORDERED that defendants', Salvatore Blanda and Cristin Curry, motion, bearing motion sequence no. 05, to strike plaintiff's amended verified bill of particulars and granting defendants summary judgment is denied, and it is

ORDERED that plaintiff's cross-motion, bearing motion sequence no. 06, for leave to amend his complaint and bill of particulars and to deem the same served *nunc pro tunc*.s granted.

This constitutes the Decision and Order of the Court.

Dated: December 7, 2021

ORLANDO MARRAZZO, JR., J.S.C.

Hon. Orlando Marrazzo, Jr.
Supreme Court Justice