SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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EILEEN O'DONNELL,

Plaintiff,

IAS Part 8
Index No. 608762/2019
Motion Seq. Nos. 001-002

-against-

LUIGI'S PIZZERIA INC., LUIGI'S PIZZERIA RESTAURANT, INC., JOHN DOE INC., and 526 JERICHO TPKE LLC d/b/a LUIGI'S PIZZERIA,

Defendants.

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LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendant Jericho's Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Notice of Cross-Motion, Affirmation & Exhibits.....2
Defendant's Affirmation in Opposition.....3
Plaintiff's Reply Affirmation 4

This is an action for personal injuries plaintiff allegedly sustained on July 1, 2016 as a result of a slip and fall at a pizzeria located at 526 Jericho Turnpike in Mineola, New York. Defendant 526 Jericho Turnpike LLC d/b/a Luigi's Pizzeria now moves to dismiss the action pursuant to CPLR 3211(a)(5) and (8) on the grounds that (a) it was not timely served with the summons and complaint and (b) the statute of limitations has run as against it. Plaintiff cross-moves (1) for leave to amend the complaint to properly include 526 Jericho as a defendant; (2) for an extension of time to serve the complaint against 526 Jericho; and (3) for

[* 1]

an order deeming the amended complaint timely served. For the reasons set forth herein, the motion is granted and the cross-motion is denied.

FACTUAL BACKGROUND

This court has been provided with no facts relating to the incident that precipitated this lawsuit apart from the bare-bones allegations of the complaint: plaintiff was peacefully upon the premises located at 526 Jericho Turnpike when she "was caused to slip and/or trip and/or fall on a slippery and/or otherwise defective floor" in the premises as a result of the "negligence, carelessness and/or recklessness" of the defendant(s). It appears from an affidavit submitted by the general manager of 526 Jericho that the corporation does business at the location as "Luigi's Pizzeria." 526 Jericho has continuously operated the pizzeria in question since 2012. It has no connection to any corporate entity known as Luigi's Pizzeria.

Plaintiff originally commenced this action on June 27, 2019 against Luigi's Pizzeria Inc., Luigi's Pizzeria Restaurant, Inc. and John Doe Inc. On December 6, 2019, *i.e.*, 162 days later, plaintiff purportedly served the summons and complaint upon Nick Spinelli, an individual identified in the affidavit of service as the manager of Luigi's Pizzeria Inc., who purportedly was authorized to accept service. Spinelli was a shift supervisor employed by 526 Jericho.

On March 20, 2020, pursuant to Executive Order 202.8, all time limitations set forth in the CPLR were tolled; the toll extended through November 3, 2020 pursuant to subsequent Executive Orders, culminating in Executive Order 202.67.

At some unknown time after the pleadings were purportedly served, plaintiff's counsel somehow was in communication with 526 Jericho's insurance carrier which, on April 9, 2020, notified plaintiff's counsel that 526 Jericho was unaware of any slip and fall at its location, that 526 Jericho was not named in the complaint and stated: "Please confirm with your client and if it [the incident] is at our location, please file an amended complaint."

On June 23, 2020, plaintiff filed a supplemental/amended summons and complaint which purported to add 526 Jericho as a defendant. Plaintiff did not seek leave of court before adding this new party. Plaintiff served 526 Jericho by service upon the Secretary of State on June 24, 2020.

526 Jericho served an Answer to the Amended Complaint on November 18, 2020. The Answer contained twenty affirmative defenses, but the failure to obtain court leave to amend the complaint was not one of them. 526 Jericho did assert a defense pursuant to CPLR 3211(a)(8) that service was not properly effected. 526 Jericho also asserted the statute of limitations as a defense.

LEGAL ANALYSIS

The posture and history of this action presents a number of procedural challenges to the plaintiff. First, plaintiff waited until days before a three-year statute of limitations expired to file her lawsuit. Second, plaintiff did not sue the correct entity. Third, plaintiff failed to timely serve process within the statutory period. Fourth, plaintiff attempted to amend her summons and complaint without court permission even though the time for her to do so had expired.

Although plaintiff has cross-moved to amend the complaint, that motion is moot because the complaint has already been amended and 526 Jericho answered the complaint. Although plaintiff did not obtain the necessary court leave to amend her complaint, 526 Jericho waived this defense by answering the amended pleading without objecting to the unauthorized amendment. *See Jordan v. Altagracia Aviles,* 289 A.D.2d 532 (2d Dept. 2001); *Nassau County v. Inc. Village of Roslyn*, 182 A.D.2d 678 (2d Dept. 1992). 526 Jericho's motion to dismiss is based upon the untimeliness of plaintiff's claim, not the unauthorized nature of the amendment.

That leads the court to an analysis of the timeliness of plaintiff's claim against 526 Jericho. Undoubtedly, the statute of limitations had run by the time plaintiff amended her complaint to add 526 Jericho as a party. Pursuant to CPLR § 214(6), a negligence action must be commenced within three years of the date of the accident. Plaintiff argues that her amended complaint should relate back to the filing of her initial complaint pursuant to CPLR §203(f). That statute provides that a claim asserted in an amended pleading is deemed interposed at the time the claims in the original pleading were interposed unless "the original pleading does not give notice of the ... occurrences ... to be proved pursuant to the amended pleading."

To establish the applicability of the doctrine, the plaintiff must demonstrate that (1) both claims arose out of the 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 it will not be prejudiced in maintaining its defense on the merits; and (3) the new defendant knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against it as well. *Buran v. Coupal*, 87 N.Y.2d 173, 178 (1995); *Mondello v. New York Blood Center-Greater New York Blood Program*, 80 N.Y.2d 219 (1992).

526 Jericho is not united in interest with any of the defendants named in the original complaint and plaintiff cannot seriously contend otherwise. *See Nossov v. Hunter Mountain*, 185 A.D.3d 948 (2d Dept. 2020); *Tricoche v. Warner Amex Satellite Entertainment Co.*, 48 A.D.3d 671 (2d Dept. 2008); *Rinzler v. Jafco Associates*, 21 A.D.3d 360 (2d Dept. 2005). Indeed, plaintiff has never explained how it came to pass that she named the Luigi entities as defendants and it is unknown if the original defendants even exist. *See Ferrara v. Zisfein*, 168 A.D.3d 682 (2d Dept. 2019)(party cannot be deemed united in interest with a fictional

"John Doe" defendant). As a result, the amended pleading does not relate back to plaintiff's original pleading.[1]

It is important to note that there is no evidence that 526 Jericho received notice that plaintiff intended to sue anyone within the limitations period. *See Schiavone v. Fortune*, 477 U.S. 21 (1986).[2] The service of the original complaint in December 2019 took place over five months after the limitations period had expired and 40 days after the statutory deadline for such service. 526 Jericho had no notice of the plaintiff's claims until, at best, nearly 3 1/2 years after plaintiff's alleged fall, "leading to an inference of substantial prejudice." *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 107 (2001).

Finally, the amended complaint cannot relate back to the filing date of the original complaint for the additional reason that the complaint itself was subject to dismissal. *See Goldberg v. Camp Mikan-Recro*, 42 N.Y.2d 1029 (1977)(there must be a valid complaint to which the amended pleading can relate back). Because the original complaint was not timely served—as 526 Jericho points out—and plaintiff has not provided a sufficient basis to retroactively extend the time to serve the initial pleading (as further discussed below), the amended pleading cannot relate back to the original complaint.

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[1] Plaintiff places great weight on the fact that a claims examiner employed at 526 Jericho's insurance company suggested to plaintiff that she amend her complaint if she intended to sue 526 Jericho. The emails from the insurer attached to plaintiff's papers, dated in April 2020—long after the limitations period had run—reflect that 526 Jericho was unaware of plaintiff's purported fall over 3 years earlier and questioned whether plaintiff had actually fallen at 526 Jericho Turnpike or some other location. Of course, in all events, a claims examiner's invitation to file an amended complaint does not equate to a waiver of a statute of limitations defense.

[2] New York's three-part test to determine whether an amended complaint relates back to the filing of the original complaint was adopted largely from the federal law. See *Mondello v. New York Blood Center-Greater New York Blood Program*, 80 N.Y.2d at 226. The Supreme Court affirmed the dismissal of an action as untimely in *Schiavone* because the added defendant was not given notice of the claim prior to the expiration of the limitations period. Thereafter, Fed.R.Civ.P. 15(c) was amended in 1991 to extend the time within which the new party had to be aware of the action: 120 days from the filing of the original complaint. *See Aslanidis v. U.S. Lines, Inc.*, 7 F.3d 1067, 1075-76 (1993). The 120-day extension correlates to the time in which a complaint has to be served under both federal and state law. Here, it is not asserted that 526 Jericho had notice of plaintiff's claim within either the limitations period or 120 days after the filing of the original complaint.

The supplemental summons and amended complaint did not purport to merely correct a misnomer but added a new defendant after the expiration of the statute of limitations. *Tricoche*, 48 A.D.3d at 673. Even if plaintiff's actions are viewed as an attempt to substitute the proper name of an entity that she had already sued and served—*i.e.*, substitute 526 Jericho for Luigi's Pizzeria Inc., Luigi's Pizzeria Restaurant, Inc. and/or John Doe Inc., the action must still be dismissed. While CPLR 305(c) may be used to cure a misnomer in the description of a party defendant, it cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served. *Nossov v. Hunter Mountain,* 185 A.D.3d at 948; *Tokhmakhova v. H.S. Brothers II Corp.*, 132 A.D.3d 662 (2d Dept. 2015). Plaintiff did not properly serve any of the original defendants within 120 days as required by CPLR 306-b.

Although plaintiff now belatedly seeks an extension of time to effect such service—an application made 14 months after the service deadline had expired—she fails to describe any circumstance justifying an extension under either the "good cause" or "interest of justice" standards. *See Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 107.

Although it is true that the expiration of the statute of limitations is an important factor in determining whether an extension should be granted in the interest of justice (see *Bumpus v. N.Y. City Transit Auth.*, 66 A.D.3d 26 (2nd Dept. 2009), plaintiff must still provide the court with enough information so that it can analyze "the factual setting of the case and a balancing of the competing interests presented" and consider plaintiff's "diligence, or lack thereof … the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant." *Federal National Mortgage Assoc. v. Cassis*, 187 A.D.3d 1145 (2d Dept. 2020). As previously discussed, 526 Jericho is prejudiced by plaintiff's unexplained delay. *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d at 107. No facts concerning the merits of plaintiff's claim are presented. Plaintiff did not seek an extension until faced with a

motion to dismiss. And, as previously noted, no showing of plaintiff's diligence is even attempted.

Plaintiff does not seek to rely on CPLR 1024 to save her claims and such reliance would be fruitless. To successfully sue an unknown party pursuant to CPLR 1024 plaintiff is required to establish that she made timely, diligent efforts to identify the correct party before the statute of limitations expired and before commencement of the action. *Bumpus v. N.Y. City Transit Auth.*, 66 A.D.3d at 29-30; *see also Comice v. Justin's Restaurant*, 78 A.D.3d 641 (2d Dept. 2010); *Walker v. Hormann Flexon, LLC*, 153 A.D.3d 997 (3d Dept. 2017). Here, plaintiff has failed to describe what efforts, if any, were made to ascertain the owner or manager of the pizzeria during the three years prior to bringing suit or the year following suit prior to the amendment.

For all of the foregoing reasons, the motion to dismiss is granted and the cross-motion is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: March 19, 2021
Mineola, New York

ENTERED
Mar 23 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

LEONARD D. STEINMAN, J.S.C.