

Henry v Carpel Cleaning Corp.

2023 NY Slip Op 34040(U)

November 9, 2023

Supreme Court, Kings County

Docket Number: Index No. 501420/2018

Judge: Sharon Bourne-Clarke

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DJMP of the Supreme Court
of the State of New York, held in and
for the County of Kings, at the
Courthouse located at 320 Jay Street,
Brooklyn, New York, on the
15th day of August, 2023.

P R E S E N T: HON. SHARON BOURNE-CLARKE

Justice of the Supreme Court

-----X
AESHA HENRY,

Index No. 501420/2018

Plaintiff,

-against-

DECISION & ORDER

CARPEL CLEANING CORP.,

Defendant.
-----X

Upon reading the filing of the defendant Carpel Cleaning Corp's order to show cause to vacate the default judgment, dismissal of the complaint and attorney's fees and costs, the attorney affirmation and memorandum of law of Michael S. O'Reilly of Saul Ewing LLP, the sworn affidavit of Scott Carpel dated July 7, 2023 and exhibits in support of the order to show cause, and upon reading the filing of the plaintiff Aesha Henry's cross motion for an extension of time to serve process, supplement the summons and amend the complaint to add CBM Solutions LLC, and discovery, the brief and attorney affirmation of William J. Sanyer of David Horowitz, P.C. in support of the cross motion and in opposition to the order to show cause, and the sworn affidavit of merit of Aesha Henry dated August 11, 2022 and upon reading the defendant's opposition to the cross motion and reading the plaintiff's reply in support of the cross motion and in response to defendant's opposition and reading the pleadings, papers and proceedings heretofore had herein and uploaded to NYSCEF, and

After oral arguments held on August 15, 2023 with the record now closed, and after due deliberation and consideration, it is the decision and order of this court as follows:

FINDINGS OF FACT:

According to plaintiff's complaint and affidavit of merit, plaintiff Aesha Henry ("Plaintiff" or "Ms. Henry") alleges that on February 7, 2017, she was employed by Century 21 Department Store at 445 Albee Square West, Brooklyn, New York. ("Century 21"). On this day, while plaintiff was in the course of her employment at Century 21, Ms. Henry alleges she was caused to slip and fall due to a wet floor condition in the employee bathroom. As a result, plaintiff alleges she sustained serious bodily injuries.

Plaintiff further alleges that defendant Carpel Cleaning Corp. ("Carpel Cleaning") was negligent in causing and creating the wet floor condition and or having notice of the condition and failing to remedy same.

Carpel Cleaning submits an affidavit by its principal Scott Carpel. Mr. Carpel was the principal of Carpel Cleaning. Carpel Cleaning was in the business of providing cleaning and janitorial services. Mr. Carpel avers that Carpel Cleaning is not the proper defendant. Mr. Carpel admits that non-party Carpel Building Maintenance known as CBM Solutions LLC ("CBM Solution") is the proper defendant. CBM Solution likewise provides cleaning and janitorial services. At the relevant time period, there is evidence that both Carpel entities were operated by Mr. Carpel out of the same business address at 28 Bloomfield Avenue, Pine Brook, New Jersey ("28 Bloomfield").

After the accident, Ms. Henry retained the office of David Horowitz, P.C. ("DHPC" or "Firm") to prosecute her negligence claims. Plaintiff submits evidence that a few

weeks after the accident, the Firm mailed a claim letter to Carpel Cleaning at 28 Bloomfield. ¹ In late February 2017, Mr. Carpel contacted the Firm in response to the claim letter.

On January 23, 2018, plaintiff timely commenced her action against Carpel Cleaning. On March 20, 2018, the summons and verified complaint were timely served upon the New York State Secretary of State for service upon Carpel Cleaning, an unauthorized foreign corporation. Carpel Cleaning was not registered with the New York State Secretary of State and did not provide the New York Secretary of State with an address for service of process. Mr. Carpel claims that he never received notice of the lawsuit in time to defend. Carpel Cleaning did not interpose an answer to the complaint.

On July 10, 2018, plaintiff mailed a default letter with the summons and complaint and affidavit of service to Carpel Cleaning at its known business address of 28 Bloomfield.

On March 18, 2019, plaintiff timely moved for a default judgment against Carpel Cleaning for failing to answer the complaint. The affidavit of service and summons and complaint were filed as an exhibit to the motion for default.

By Order dated May 7, 2019, the Court granted plaintiff's application for a default judgment against Carpel Cleaning.

On May 31, 2019, plaintiff filed the note of issue together with the default judgment order dated May 7, 2019.

There is evidence that the Firm on behalf of plaintiff sent multiple mailings related to the lawsuit to Carpel Cleaning at 28 Bloomfield beginning within weeks of the accident through May 2023. The inquest was scheduled and adjourned on several dates and marked final for July

¹ Carpel Cleaning does not submit sworn testimony or an affidavit in opposition to the facts alleged by plaintiff in her cross motion.

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Mr. Carpel admits that after receiving plaintiff's attorney's two written notices of the inquest dated May 22, 2023 mailed to Mr. Carpel and Carpel Cleaning at 28 Bloomfield, on May 31, 2023, Mr. Carpel called plaintiff's attorney to advise him that Carpel Cleaning was not the correct defendant but that his Carpel company CBM Solutions was the correct defendant.

On June 1, 2023, over six years post accident, Mr. Carpel emailed plaintiff's attorney the Carpel CBM Solutions contract and invoice demonstrating that CBM Solutions had a cleaning contract with Century 21 and was present at the time and place of the plaintiff's accident.

Carpel Cleaning now moves to vacate the default judgment and for dismissal of the case due to improper service. Carpel Cleaning also seeks attorney's fees and costs arguing that plaintiff's continued litigation is frivolous.

In response, plaintiff cross moved seeking leave of this court to extend the time to serve Carpel Cleaning under CPLR 306-b and to supplement the summons and amend the complaint to add CBM Solutions as a defendant under the relation back doctrine of CPLR 203.

Plaintiff likewise submits opposition to vacature of the default, dismissal and for attorney's fees and costs. Carpel Cleaning submits opposition to the plaintiff's cross motion. Plaintiff submits her reply.

On August 14, 2023, this Court held oral arguments and closed the record.

DECISION AND ORDER

That branch of defendant Carpel Cleaning's order to show cause to dismiss the

2 On July 31, 2023, due to the filing of the defendant's order to show cause, the inquest was adjourned to November 14, 2023 with the consent of all parties and the Court.

complaint against Carpel Cleaning is held in abeyance until after service upon Carpel Cleaning under CPLR 306-b.

That branch of defendant Carpel Cleaning's order to show cause to vacate the default judgment is granted in accordance with this decision and order.

That branch of defendant Carpel Cleaning's order to show cause seeking sanctions, attorney's fees and or costs pursuant to 22 N.Y.R.R. §130-1.1 and or CPLR 8303-a is denied.

That branch of plaintiff's cross motion pursuant to CPLR 306-b for leave to serve Carpel Cleaning is granted in the interests of justice and for good cause as discussed further *infra*.

That branch of plaintiff's cross motion seeking relief under the relation back doctrine of CPLR 203 to supplemental summons and amend complaint to add CBM Solutions LLC is granted as discussed further *infra*.

DISCUSSION

Defendant's Requested Relief Under 22 N.Y.C.R.R. §130-1.1 and or CPLR 8303-a:

Carpel Cleaning's application for sanctions, attorney's fees and or costs pursuant to 22 N.Y.C.R.R. §130-1.1 and or CPLR 8303-a is denied. I find no evidence of frivolous or willful conduct on the part of the plaintiff and her attorneys.

Defendant's Requested Relief To Vacate The Default Under CPLR 5015

This Court finds sufficient reason to exercise its discretion and vacate the default judgment. The default judgment order dated May 7, 2019 (NYSCEF Doc. 8) is vacated in accordance with this decision and order of the Court.

Plaintiff's Requested Relief To Extend Under CPLR 306-b

A party's application for late service of process pursuant to CPLR 306-b should be liberally granted whenever the movant has been reasonably diligent and there is no prejudice to the opponent. Busler v. Corbett, 259 A.D.2d 13, 696 N.Y.S.2d 615 (App. Div. 4th Dep't 1999) citing N.Y.Legis. Ann. op. cit. at 319; Cooke-Garrett v. Hogue, 109 A.D.3d 457(App. Div. 2d Dep't 2013); See CPLR §306-b (Supplementary Practice Commentaries at C306-b:3).

This Court has broad authority to extend the time for a litigant to serve process upon a foreign unauthorized corporation. There is no "arbitrary time period with respect to the extension, the matter lies in the Court's discretion." CPLR §306-b (Supplementary Practice Commentaries at C306-b:3 citing AIG Managed Market Neutral Fund v. Askin Capital Mgt., L.P., 197 F.R.D. 104 (S.D.N.Y. 2000).

CPLR 306-b permits this court to grant an extension to serve process upon a defendant when appropriate where good cause is shown or in the interest of justice. See CPLR §306-b; and See Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104 (2001).

The good cause standard requires a threshold showing that plaintiff made "reasonably diligent efforts" to make timely service. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 104.

On the other hand, the interest of justice standard is broad and less stringent than the good cause standard to accommodate late service due to "mistake, confusion or oversight, so long as there is no prejudice to the defendant." CPLR §306-b (2019-Supplementary Practice Commentaries at C:306-b:3) citing Leader v. Maroney, 97 N.Y.2d 95 (2001).

CPLR 306-b requires the Court faced with dismissal of a viable claim to consider any factor relevant to the exercise of its broad discretion as public policy favors resolution of cases

on the merits. Leader v. Maroney 97 N.Y.2d at 105 and Rozz v. Law Office of Saul Kobrick, P.C., 134 A.D.3d 920 (App. Div. 2d Dep't 2015).

Some relevant factors that may be weighed under the interests of justice standard are: whether the litigant was diligent in attempting service or not; the expiration of the statute of limitations; the merits of the case; the length of delay in service; the promptness for the request for an extension; and any prejudice to the defendant. Leader v. Maroney 97 N.Y.2d at 105.

A defendant's knowledge of the nature of the claim and lawsuit within the required time limits will demonstrate a lack of prejudice in favor of granting the application. See CPLR §306-b (2016-Supplementary Practice Commentaries at C306-b:3) citing Health v. Normile, 131 A.D.3d 754 (App. Div. 3d Dep't 2015); and Dhuler v. ELRAC, Inc., 118 A.D.3d 937 (App. Div. 2d Dep't 2014).

No one factor is dispositive, and the Court may consider all the relevant factors where an extension is requested in the interest of justice. Leader v. Maroney 97 N.Y.2d at 105. Rozz, supra, 134 A.D.3d 920 (Courts favor resolution of cases on the merits).

The credible and admissible evidence before this Court demonstrates that plaintiff's case has merit. There is credible evidence that advertisements for both Carpel Cleaning and CBM Solutions during the relevant period highlight the Carpel Cleaning name rather than CBM Solution creating reasonable confusion as to the proper entity.

The three (3) year statute of limitations to commence a lawsuit has expired. This Court is satisfied that upon plaintiff learning of the defective service and potential necessary party on or about May 31, 2023, she investigated and sought relief promptly.

Moreover, I find no prejudice to Carpel Cleaning in granting plaintiff's relief

given its knowledge of the plaintiff's claims, her attorney's representation and lawsuit within the statute of limitations period via telephone call and multiple mailings to Carpel Cleaning at its known business address of 28 Bloomfield.

The credible evidence reveals that Mr. Carpel, principal of Carpel Cleaning, contacted plaintiff's attorney's office following receipt of a claim letter just weeks after the accident of February 7, 2017. In late May 2023, after Carpel Cleaning received two mailings from plaintiff's attorney at its business address of 28 Bloomfield, Mr. Carpel once again called the Firm, and admitted that CBM Solutions is the proper party with the cleaning contract at the time of the accident. Notably, six years post accident on June 1, 2023, Mr. Carpel was able to locate and provide plaintiff the Carpel CMB Solution contract and invoice related to the plaintiff's claims at Century 21.

The interests of justice warrant permitting plaintiff leave to service process upon Carpel Cleaning. Plaintiff is directed to serve process upon Carpel Cleaning Corp by service of the summons and complaint upon his current attorney by regular mail and uploading same to NYSCEF within 15 days of entry of this decision and order. Plaintiff is directed to upload to NYSCEF an affidavit of service thereafter within 15 days of such service.

Carpel Cleaning is directed to interpose an answer by uploading same to NYSCEF within 30 days of the filing of the plaintiff's affidavit of service.

Plaintiff's Requested Relief Under The Relation Back Doctrine of CPLR 203

The Relation Back Doctrine was "aimed at liberalizing the strict, formalistic pleading requirements of the past century..., while at the same time respecting the important policies inherent in statutory repose..." Buran v. Coupal 87 N.Y.2d 173, 175 (1995)(Discussing CPLR 203(b)(c) Relation-Back Doctrine).

The Court has sound discretion to identify cases that justify permitting a plaintiff to correct a pleading to add a party or claim after the statute of limitation has expired in order to “facilitate decisions on the merits.” Buran v. Coupal 87 N.Y.2d at 175.

The Relation Back Doctrine allows a claim asserted against a defendant in an amended filing to relate back to the original claims previously asserted against a co-defendant for statute of limitations purposes where both claims arise out of the same conduct, transaction or occurrence; the new party is united in interest with the original defendant and that by reason of that relationship he can be charged with notice of the lawsuit that he will not be prejudiced in maintaining a defense on the merits; and the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well. Buran 87 N.Y.2d at 175 (Discussing CPLR 203(b)).

Significantly, if the new defendant had notice of the claim within the statute of limitations period, it favors granting a litigant’s requested relief under CPLR 203. Uddin v. A.T.A. Construction Corp., 164 A.D.3d 1400, 1401 (App. Div. 2d Dep’t 2018) leave to appeal dismissed Uddin v. A.T.A. Construction Corp., 32 N.Y.3d 1144 (2019) quoting Alvarado v. Beth Israel Medical Center, 60 A.D.3d 981, 1982 (App. Div. 2d Dep’t 2009)(holding that the “linchpin of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period.”)

At this juncture in the litigation, based on the record before this Court, plaintiff has submitted sufficient evidence to satisfy the three prongs under the relation back doctrine of CPLR 203 to warrant the requested relief.

A review of the original complaint and proposed amended complaint

reveal that the plaintiff alleges identical facts and negligence allegations demonstrating that both claims arise out of the same conduct, transaction and occurrence.

Based on the admissible and credible evidence submitted, this Court is satisfied that there has been a sufficient showing that defendant Carpel Cleaning Corp. and non-party CBM Solutions, LLC are united in interest to permit CBM Solutions, LLC to be charged with notice of the lawsuit that CBM Solutions will not be prejudiced.

Indeed the evidence demonstrates that the two Carpel entities operated jointly and have blurred the distinction of the corporate companies supporting a finding of unity. Uddin v A.T.A. Construction Corp., 164 A.D.3d 1400, 1401 (App. Div. 2d Dep't 2018) leave to appeal dismissed Uddin v. A.T.A. Construction Corp., 32 N.Y.3d 1144 (2019) quoting Alvarado v. Beth Israel Medical Center, 60 A.D.3d 981, 1982 (App. Div. 2d Dep't 2009).

To be sure, Mr. Carpel is the principal of Carpel Cleaning, an unauthorized foreign corporation. Mr. Carpel likewise has the authority to speak for CBM Solutions, LLC. According to the credible evidence presented, Carpel Cleaning and CBM Solutions, LLC operated a similar if not the same cleaning and janitorial services business out of the same office address at 28 Bloomfield. Both entities are operated by the same principal and hold the principal's last name of Carpel, and use the same telephone number to operate its cleaning businesses. A customer calling the number for CBM Solutions would necessarily also be reaching Carpel Cleaning and vice versa. Advertisements for CBM Solutions LLC and or Carpel Cleaning highlight Carpel Cleaning services blurring the corporate companies.

Furthermore, six years after the accident, on or about May 31, 2023, Mr. Carpel, contacted plaintiff's attorney and was able to identify and admits that his Carpel company CBM Solutions LLC is the proper defendant cleaning company. Although Mr. Carpel avers that

he contacted plaintiff's attorney related to lawsuit against Carpel Cleaning, he was able to locate the CBM Solutions contract and invoice and on June 1, 2023 provided plaintiff's attorney with the same. Again, the contract and invoice highlight the Carpel name.

More importantly, there is evidence that Mr. Carpel contracted plaintiff's attorney within weeks of the accident in response to a claim letter regarding the plaintiff's accident at Century 21. Carpel Cleaning does not dispute this fact although it had an opportunity to do so.

There is sufficient evidence that both Carpel Cleaning and CBM Solutions LLC through Mr. Carpel, had notice of the claim and lawsuit prior to the expiration of the three year statute of limitations such that CBM Solutions will not be prejudiced in defending on the merits.

Finally, the record reveals that plaintiff made a mistake in identifying the proper Carpel entity and that CBM Solutions, LLC through Mr. Carpel, should have known that but for the plaintiff's mistake, the action would have been commenced against CBM Solutions, LLC. Mr. Carpel, principal of Carpel Cleaning, admits that CBM Solutions LLC is the proper defendant and exchanged the proper contract and invoice.

Accordingly, at this juncture in the litigation and based on the credible and admissible evidence before the Court, plaintiff's requested relief under the relation back doctrine of CPLR 203 is granted.

Plaintiff is directed to upload to NYSCEF within 30 days of entry of this Decision and Order and uploaded to NYSCEF, the proposed supplemental summons and amended complaint annexed to the plaintiff's cross motion as Exhibit A. Plaintiff is further directed to serve process of the supplemental summons and amended complaint upon both

Carpel Cleaning Corp., through its present attorney, and upon CBM Solutions LLC per CPLR and or BCL or other governing statute for service of process.

This Court's decision granting plaintiff's relief under CPLR 203 does not preclude CBM Solutions LLC from raising all appropriate defenses which will be decided after the exchange of discovery.

ORDERED, that Defendant Carpel Cleaning Corp's order to show cause is denied to the extent it seeks an award of costs and attorneys' fees pursuant to N.Y. C. C. R. R. 22 § 130-1.1 and C.P.L.R. § 8303-a, and is otherwise held in abeyance pending service of the summons and complaint on Defendant Carpel Cleaning Corp and CBM Solutions LLC; and it is further

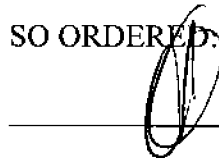
ORDERED, that the parties are directed to appear at IAS Part on January 23, 2024 for oral argument on the portions of Defendant Carpel Cleaning Corp's order to show cause that are held in abeyance.

This constitutes the decision and order of the Court.

Dated: New York, New York

November 8, 2023

SO ORDERED.



J.S.C.