

Opiela v May Industries Corporation

2003 NY Slip Op 30100(U)

May 15, 2003

Supreme Court, New York County

Docket Number: 0116741/2000

Judge: Marcy S. Friedman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

MARCY S. FRIEDMAN

P

PART 57

Justice

Opella S J

INDEX NO. 116744-06

- v -

MOTION DATE _____

May Ind Corp

MOTION SEQ. NO. 05

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/fo dismiss

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

SCANNED

Replying Affidavits _____

3

MAY 20 2003

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is granted as per accompanying decision/order.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 5/15/03

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Duplicate Original

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 57

STEVEN J. OPIELA,

Index No.: 116741/00

Plaintiff(s),

against

DECISION/ORDER

MAY INDUSTRIES CORPORATION,
LEHRER MCGOVERN & BOVIS,
PETRACCA & SONS,
PERINI-THUNDERBIRD CORPORATION,

Defendant(s),

Present: HON. MARCY FRIEDMAN
Justice, Supreme Court

In this action, plaintiff sues to recover for injuries allegedly sustained in August 1998 when he was hit by a piece of steel that fell from a construction area while he was working as a Port Authority police officer at LaGuardia Airport. The original complaint was filed in August 2000 against defendants Turner Construction General Contractor (“Turner”), ABC General Contractor Corp. I-X, May Industries Corporation (“May”), DEF Subcontractor Corp I-X, XYZ Corporation I-X, and John Doe Employee I-X. Plaintiff subsequently moved to amend the summons and complaint pursuant to CPLR 1024 to add Petracca & Sons (“Petracca”), Lehrer McGovern & Bovis (“Lehrer”) and Perini Thunderbird Corporation (“Perini/Thunderbird”) in place of ABC General Contractor Corp. I-X and DEF Subcontractor Corp. I-X, and to extend his time to serve the amended complaint pursuant to CPLR 306-b. That motion was granted on default by order of this court dated August 5, 2002.’

¹The complaint was discontinued against Turner by stipulation dated July **18, 2002**. Although it does not appear that the complaint has been discontinued against May, plaintiff now acknowledges that

Defendants Perini/Thunderbird, Petracca, and Lehrer each now make pre-answer motions to dismiss the complaint. Defendant Perini/Thunderbird moves to dismiss on the grounds that it was never served with the original complaint and was not sufficiently identified in the original complaint to give it notice that it was an intended party, and that the statute of limitations bars the action. Defendant Petracca moves to vacate its default on the motion to amend, to deny the motion to amend, and to dismiss the complaint based on the statute of limitations. Defendant Lehrer moves to dismiss the complaint on the grounds that it was not served with the amended complaint and that the amended complaint is time-barred.

In opposition, plaintiff contends that CPLR 1024 and CPLR 306-b permit him to amend and serve the complaint, notwithstanding the expiration of the statute of limitations. As a threshold matter, plaintiff argues that defendants have failed to demonstrate an excuse for their default on the prior motion or a meritorious defense, and therefore that the prior order granting plaintiff leave to amend and serve the complaint should not be vacated. However, as it is conceded that the instant defendants were not served with the original complaint, the court did not have jurisdiction over them at the time of the prior motion. The court will accordingly address the merits of the motions to dismiss.

CPLR **1024** provides that “[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.” “In order to employ the procedural mechanism made available by CPLR 1024, the plaintiff must show that he

May is not a proper party. (Aff. In Opposition to Defendant Lehrer, McGovern & Bovis’s Motion to Dismiss, ¶ 26.) Thus, neither of the original named defendants remains in the case.

made ‘genuine effort[s] to ascertain the defendants’ identities prior to the running of the Statute of Limitations’.” (Luckern v Lyonsdale Energy Ltd. Partnership, 229 AD2d 249,253 [4th Dept 1997], lv denied 1997 NY App Div LEXIS 6454 [4th Dept]; Porter v Kingsbrook OB/GYN Assocs., 209 AD2d 497 [2d Dept 1994], appeal dismissed 86 NY2d 871 [1995].)

Here, a substantial question exists as to whether plaintiff’s efforts to ascertain defendants’ identities were sufficient to entitle him to employ the procedural mechanism of CPLR 1024 and thus to serve a “John Doe” summons and complaint. According to plaintiff’s counsel, the efforts to identify defendants prior to filing the complaint consisted solely of inquiries made by plaintiff and a limited FOIL request served by his counsel: Plaintiff attests that he “made inquiries with various employees of the Port Authority to learn what company was responsible for building the canopy that was situated above me when I had my accident” and that he was informed that the party responsible was May Industries Corporation. (Opiela Aff. In Opposition, ¶¶ 4, 5.) Plaintiff’s counsel followed-up by submitting a FOIL request to the Port Authority. (Lizzi Aff. In Support of Motion to Amend, ¶ 5.) Notably, however, the FOIL request sought only “a copy of the contract with May Industries for work that was conducted at the LaGuardia Airport” (FOIL request dated March 3, 1997 [sic], Ex. B to Lizzi Aff.), and did not contain a broader request for information about other contracts for construction work in the vicinity of plaintiff’s accident.

Even assuming arguendo that the “John Doe” complaint was authorized under CPLR 1024, “a summons served in a ‘John Doe’ form is jurisdictionally sufficient only if the actual defendants are ‘adequately described and would have known, from the description in the complaint, that they were the intended defendants’.” (Lebowitz v Fieldston Travel Bureau, Inc., 181 AD2d 481,482 [1st Dept 1992][citations omitted].) “The essential requirement to bring a

defendant into court is that the defendant be named or described in such form as will properly identify the defendant and give notice of opportunity to defend.” (City of Mount Vernon v Best Dev. Co., 268 NY 327,331 [1935], rearg denied 268 NY 708.)

Further, jurisdiction over such a “John Doe” is not acquired “unless the process is served in such a manner as to give that unidentified person notice that he or she is being summoned to court.” (Harak v Lydig Superette, Inc., 161 Misc2d 445,446 [Sup Ct, Bronx County 1994]. See Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 1024, at 250.) In addition, CPLR 1024 “does not serve to toll the Statute of Limitations.” (Green v County of Fulton, 123 AD2d 88, 90 [3d Dept 1987].)

The original complaint in this action alleges that, “upon information and belief, defendant TURNER CONSTRUCTION and ABC General Contractor Corp. I-X, (said names being fictitious, true names presently unknown), was [sic] and continues to be a corporation authorized and licensed to do business in the State of New York and engaged as the general contractor for LaGuardia Airport” (Complaint, ¶ 2); and that “defendant MAY INDUSTRIES CORPORATION, and/or DEF Subcontractor Corp. I-X, (said names being fictitious, true names presently unknown), was and continues to be a corporation whose address was and continues to be PO Box 624, Old Greenwich, and State of Connecticut.” (Complaint, ¶ 3.) The complaint further alleges that defendants Turner and the unidentified general contractors were “under a contract made by and between The Port Authority of New York and New Jersey for general repairs to the premises” (Complaint, ¶ 6), and that May and the unidentified subcontractors were subcontracted “to perform constructional work at the premises commonly known as the LaGuardia Airport.” (Complaint, ¶ 12.)

Given the many and varied contractors and subcontractors hired to perform construction work at the airport, these allegations are insufficient to alert defendants Petracca, Lehrer and Perini/Thunderbird to the fact that they were intended defendants. Further, it is undisputed that plaintiff did not serve the original complaint on any of the “Doe” defendants. Nor does plaintiff contend that the “Doe” defendants were united in interest with Turner or May or otherwise can be charged with notice of the original complaint on the basis of the relation-back doctrine. Thus, the essential requirement of notice of the opportunity to defend was not provided to defendants Perini/Thunderbird, Petracca, and Lehrer.

Nor, under the circumstances here, does CPLR 306-b provide plaintiff with an extension of time to amend and serve the complaint. It has been held that “a claim asserted against unknown parties pursuant to CPLR 1024 is deemed to be interposed against those parties for Statute of Limitations purposes when a ‘John Doe’ summons with notice or summons and complaint is filed with the clerk of the court” (Luckern, 229 AD2d at 253), and that CPLR 306-b applies to such a “John Doe” complaint filed in accordance with CPLR 1024. (Id. See Tucker v Lorieo, 291 AD2d 261 [1st Dept 2002].)

CPLR 306-b permits service of a summons and complaint within 120 days after filing. It thus makes “the act of filing the point at which a claim is interposed for Statute of Limitations purposes.” (Leader v Maronev. Ponzini & Spencer, 97 NY2d 95, 100[2001].) CPLR 306-b further provides that if service is not made upon a defendant within this 120 day time period, “the court, upon motion, shall dismiss the action without prejudice as to that defendant, or, upon good cause shown or in the interest of justice, extend the time for service.”

In Leader, the Court of Appeals recently clarified that “good cause” and the “interest of

justice” are “two separate standards by which to measure an application for an extension of time to serve” under CPLR 306-b. (Leader, 97 NY2d at 104.)

The interest of justice standard requires a careful judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties. Unlike an extension request premised on good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter. However, the court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiffs request for the extension of time, and prejudice to defendant.

(Id. at 105-106. See also Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C306-b:3.)

In the instant case, the time for service of the John Doe complaint expired on December 3,2000, 120 days after filing of the summons and complaint. Plaintiff now contends, however, that the time to serve the complaint should be extended under CPLR 306-b on the grounds that he made diligent efforts to identify the defendants but that these efforts were frustrated by the dilatory tactics of the original named defendant May, that the statute of limitations for filing a new action against the proper defendants has expired, and that denial of an extension would unfairly prejudice plaintiff. (Aff. in Opposition to Perini/Thunderbird, ¶ 16.)

More particularly, plaintiff attests that following his accident, he made inquiries of the Port Authority in order to ascertain the entities involved in construction in the area where he was injured, which resulted in the commencement of an action against Turner and May and additional unknown parties in August 2000. Based on information provided by the Port Authority, including the contract with May that plaintiff obtained in June 2000, plaintiff claims that he had reason to believe that May was the proper defendant. Plaintiff’s counsel further asserts that

following receipt of the contract and commencement of the action, he attempted to obtain information from May about other possible defendants, but was prevented from doing so by May's delay in answering or referring the matter to its insurance carrier and its failure to respond to plaintiff's requests for information and documents. According to plaintiff, due to the difficulties in obtaining information from May, the identity of the proper parties was not revealed until May 2002, when a non-party deposition of the Port Authority was held, at which it was finally confirmed that May was not the contractor involved in the construction work that caused plaintiff's accident.

However, given May's considerable delay in appearing in the action and its lack of cooperation in responding to plaintiff's requests for information, plaintiff's singular reliance on May to provide the identity of other defendants cannot excuse his failure to attempt to obtain necessary information from other sources, including the Port Authority. Significantly, the contract that plaintiff obtained from the Port Authority clearly indicates that May was the contractor for a project on the "departures" level at LaGuardia, while plaintiff alleges that his injury occurred on the "arrivals" level. Plaintiff offers no explanation as to why the contract itself did not alert him to the need to make further inquiries of the Port Authority. Rather, plaintiff merely asserts that the contract "called for many components actually contained within the canopy and ceiling structure situated above the plaintiff at the time of the accident." (Aff. In Opposition to Defendant Lehrer, ¶ 20.) Further, plaintiff's assertion that "there was no reasonably perceived need" (*id.*, **124**) to make additional inquiries of the Port Authority about other contractors, because the Port Authority had already identified May as the proper party, fails to demonstrate that plaintiff made diligent efforts to identify the other parties to the action.

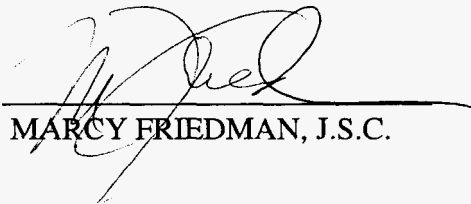
Moreover, assuming arguendo that plaintiff made genuine efforts to identify the unknown defendants prior to the commencement of the action, at the time that plaintiff filed the original complaint, he still had approximately one year before the statute of limitations expired. Plaintiff did not move to amend the complaint, or extend his time to serve, until almost two years later, well after the statute of limitations had run. In view of the lack of notice to defendants of plaintiff's claims for nearly four years after their accrual, such a delay "lead[s] to an inference of substantial prejudice." (Leader, 97 NY2d at 107.) The court thus finds that an extension of time to serve is not warranted under CPLR 306-b.

Accordingly, defendants' motions are granted to the extent that it is

ORDERED that the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: New York, New York
May 15, 2003


MARCY FRIEDMAN, J.S.C.