

Klein v Beta I, LLC

2006 NY Slip Op 30030(U)

March 13, 2006

Supreme Court New York County

Docket Number:

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

Klein

- v -

Beta I

INDEX NO. 107701/02
MOTION DATE 6/24/03
MOTION SEQ. NO. 03
MOTION CAL. NO. _____

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

SCANNED

NOV 05 2003
PAPERS NUMBERED _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: October 27, 2003

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X

RICHARD KLEIN, D.C.,

Plaintiff,

Index No. 107701/02

-against-

BETA I, LLC, BETTINA EQUITIES COMPANY,
PELHAM CONSTRUCTION CORP., and 317
WEST 54TH OWNERS CORP..

Defendants.

-----X

JOAN A. MADDEN, J.:

In this negligence action, plaintiff moves, by order to show cause, for leave to amend the complaint to assert claims against three proposed additional defendants. The proposed defendants separately oppose the motion. For the reasons discussed below, plaintiff’s motion is denied.

BACKGROUND

The following is based on the original complaint in this action. Plaintiff is a Doctor of Chiropractic Medicine, whose office was located at 317 West 54th Street in Manhattan. Defendant Beta I, LLC (Beta) owns the property next to the building where plaintiff conducted his practice. Defendant Bettina Equities Company (Bettina) was responsible for the management, operation, demolition, excavation, and construction performed on Beta’s property. The proposed amended complaint identifies Bettina as the managing agent of Beta’s property. Defendant Pelham Construction Corp. (Pelham) was the construction manager responsible for

the demolition, excavation, and construction work performed on Beta's property. Defendant 317 West 54th Street Owners Corp. (the Coop) was the proprietary lessor, cooperative corporation, owner, and operator of the land and building where plaintiff's practice was located.

In 1999, Beta began work, including destroying the sidewalk separating its property from 317 West 54th Street. Plaintiff alleges that the process of destroying the sidewalk caused structural damage to 317 West 54th Street, and related damage to his offices. In particular, plaintiff alleges that the defendants used a bulldozer to tear down and destroy the sidewalk in between the two buildings, causing structural damage to the Coop's building. In addition, plaintiff alleges that defendants "bored down into the ground right next to the subject property, exposing and undermining the Building's support at approximately 10 feet below grade level, damaging pipes and the structural foundation and integrity of the building." The complaint contains five causes of action.

Plaintiff now seeks to add as defendants, pursuant to CPLR 1003 and 3025 (b), Macro Enterprises, Ltd. (Macro), The Cantor Seinuk Group, Inc. (Cantor), and Soil Mechanics Drilling Corp and/or Soil Mechanics Drilling and Testing Corp (Soil) (collectively, the subcontractors). According to plaintiff, those companies were subcontractors for the demolition project in this action. Plaintiff's counsel states that neither plaintiff, nor his prior counsel, knew of the subcontractors or their roles in the demolition and excavation, at the time that plaintiff commenced this action.

The amended verified complaint contains only one cause of action for negligence against all of the defendants. It alleges that the subcontractors performed certain tasks negligently, under the supervision of some of the original defendants, and caused plaintiff's damages and

indicates that the negligence claim against the subcontractors arises from the demolition and excavation of Beta's property. The proposed amended complaint alleges that Macro negligently performed demolition and excavation services, Cantor negligently performed structural engineering services, and Soil negligently performed geo-technical tests and studies of the subsurface conditions at Beta's property.

Plaintiff apparently based the allegations in the proposed amended complaint on the allegations in the Coop's third-party action. According to plaintiff, he learned of the subcontractors' involvement when the Coop commenced an action against the subcontractors and the Coop's co-defendants. That action was recently consolidated with this action for discovery and trial. Plaintiff agreed to a conditional dismissal of his claims against the Coop.

DISCUSSION

Plaintiff acknowledges that he is asserting claims against the subcontractors more than three years after the alleged negligence occurred (see CPLR 214 [4]). He now bears the burden of demonstrating the applicability of the relation back doctrine (see Cintron v Lynn, 306 AD2d 118, 119 [1st Dept 2003]). Plaintiff asks the court to allow him to amend the complaint, arguing that the claims against the subcontractors relate back to the claims in the complaint.

New York law permits a plaintiff to name an additional defendant after the statutory limit for asserting claims has expired, provided that the additional defendant is united in interest with the first-named defendant (CPLR 203 [b]). "The relation back doctrine is aimed at liberalizing strict formalistic requirements while respecting the important policies inherent in the statute of limitation" (Hemmings v St. Mark's Hous. Assn., 169 Misc 2d 155, 156-157 [Sup Ct, Kings County 1996], appeal dismissed 242 AD2d 284 [2d Dept 1997] [affirming Supreme Court's

order decided after reargument]). In Mondello v New York Blood Center (80 NY2d 219,226 [1992]), the Court of Appeals adopted the following test, as stated in Brock v Bua (83 AD2d 61, 69 [2d Dept 1991]), to determine whether the addition of a new party relates back to an earlier pleading:

(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 he 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.

Here, plaintiff has met the first requirement as the claims in the original complaint and those in the amended complaint arise out of the same construction accident causing damage to plaintiff's property. With respect to the third requirement, the Court of Appeals recently held that a plaintiff need not show that a mistake is excusable as long as the omission in joining the parties is not intentional or based on tactical advantage. See Buran v Coupal (87 NY2d 173, 176 [1995]). In this case, there is nothing to suggest that plaintiff's failure to initially join the subcontractors was intentional or done for tactical advantage.

Nonetheless, the motion should be denied as plaintiff has not shown that the subcontractors are "united in interest" with the original defendants such that they can be charged with notice of the original action. For purposes of relation back, the parties' interests must be "such that they stand or fall together and that judgment against one will similarly affect the other" (Connell v Hayden, 83 AD2d 30, 40-41 [2d Dept 1981], quoting Prudential Ins. Co. of Amer. v Stone, 270 NY 154, 159 [1936]). In other words, the original defendants and proposed defendants must "necessarily have the same defenses to the plaintiffs claim" (id. at 43). If the

only relationship between the original defendants and the proposed defendants is that of joint tortfeasors, the parties are not united in interest (Capital Dimensions, Inc. v Samuel Oberman Co., 104 AD2d 432,433 [2d Dept 1984]).

Thus, the courts have held that an employer is not united in interest with its independent contractor, since the latter is not liable for the torts of the former (Stulberger v. Bellucci, 251 AD2d 569 [2d Dept 1998], iv. denied 93 NY2d 803 [1999][prime contractor and sub-contractor are not united in interest]; Kitson v. Atlantic Refining & Marketing. Corn., 227 AD2d 971 [4th Dept 1996][independent contractor retained to perform specified services was not united in interest with its employer]).

Plaintiff argues, however, that as the work performed by the defendants was inherently dangerous, the original defendants are vicariously liable for the actions of the original defendants. Although, under certain circumstances, an employer may be vicariously liable for the acts of its independent contractor engaged in an inherently dangerous activity (See Christie v Ranieri and Sons, 194 AD2d 453,454 [1st Dept 1993]), it would appear that this exception does not apply here as the original and amended complaint do not allege that the damages to plaintiff's property were caused by a danger inherent to the work itself but, rather, as result of the methods used to perform the work (See, Whelen v. Whelen, 231 AD2d 712 [2d Dept 1996]; MacDonald v D.G. Heuer, 253 AD2d 795 [2d Dept 1998]; N.Y. Pattern Jury Instructions Civil 2:256, Vicarious Responsibility).

Moreover, even if there were an issue of fact concerning whether the demolition of the sidewalk was an inherently dangerous activity, the relationship between the original defendants and the subcontractors, unlike that of employer and employee, is not such that the original action

would have put them on notice of the possible action against them. And, significantly, plaintiff cites no case law in which an employer was found to be united in interest with his independent contractor based on the allegedly inherently dangerous nature of construction work.

In any event, despite plaintiff's characterization of the liability between the original defendants and the subcontractors as vicarious, the nature of the claims in the amended complaint indicate that the original defendants and subcontractors interests do not stand and fall together and that their defenses are not identical. (See Valmon v. 4 M & M Corn., 291 AD2d 343 [1st Dept], iv. denied 98 NY2d 617 [2002]; Hilliard v. Roc-Newark Assoc., 287 AD2d 691 [2d Dept 2001]; compare, Schiavone v Victory Mem. Hosp. (292 AD2d 365,366 [2d Dept 2002])[holding that the proposed defendant, the president of a medical practice, was united in interest with the hospital because the hospital was vicariously liable for the actions of an independent contractor when a patient goes to the hospital without intending to be treated by a specific doctor or medical group]). Thus, for example, the original defendants are alleged to have negligently supervised the work and might defend such claims by asserting that subcontractors failed to properly follow their instructions.

And, Hemmings v St. Mark's Hous. Assn. (169 Misc 2d at 160, aff'd 242 AD2d 284 [2d Dept 1996]), is not controlling here as Hemmings involved claims arising under Labor Law §§ 240 (1) and 241(1), and therefore there was no question that the owner would be vicariously liable for the actions of the general contractor and pursuant to an indemnification agreement.

Accordingly, as plaintiff has not demonstrated that the original defendants are united in interest with the subcontractors, the claims against the subcontractors are time-barred and the motion for leave to amend the complaint must be denied.

CONCLUSION

Accordingly, in view of the above, it is

ORDERED that plaintiff's motion for leave to amend the complaint is denied in its entirety.

DATED: October 27, 2003

A handwritten signature in black ink, appearing to be the initials 'J.S.C.', is written over a light grey rectangular background.

J.S.C.