SUPREME COURT OF THE STATE OF NEW YORK **Index No.103727/06**
COUNTY OF RICHMOND DCM PART 3 **Motion No.:005,006**

OSCAR GARCIA,

Plaintiff

against

MT. AIRY ESTATES, INC.,
SARNA ENTERPRISES,
NEW WINDSOR DEVELOPMENT CO, LLC, and
BLUE LINE DRYWALL, INC.,

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of these motions 1) to dismiss and 2) to renew and reargue.

Papers	**Numbered**
Notice of Motion and Affidavits Annexed	**1,2**
Answering Affidavits	
Replying Affidavits	
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant, Blue Line Drywall, Inc. ("Blue Line"), moves this court pursuant to CPLR § 3211 for an order dismissing plaintiff's complaint as being beyond the statute of limitations. Plaintiff moves this court pursuant to CPLR § 2221 for leave to renew his motion dated August 31, 2007 that sought to amend the complaint to name Blue Line as a defendant, and upon renewal granting plaintiff's motion to amend the complaint. Blue Line's motion is denied, while plaintiff's motion is granted.

Facts

This action arises out of alleged personal injuries sustained by plaintiff as a result of a fall from stilts while plaintiff worked as a dry-waller. Plaintiff commenced this action at some time during the year 2006. Subsequent to commencing this action, the plaintiff determined that he mistakenly named Sarna Enterprises ("Sarna") as a defendant in this action. By motion dated

August 31, 2008 made returnable on September 21, 2007 plaintiff sought leave of court to amend his complaint to add New Windsor Development Co., LLC ("New Windsor") and Blue Line as defendants to this action. According to the affirmation in support to his motion, plaintiff's attorney asserted that Mark Sarna, ("Sarna") one of the owners of Mt. Airy Estates, Inc. ("Mt. Airy") averred in an affidavit that the general contractor managing the work site where plaintiff sustained his injuries was New Windsor. The plaintiff's affirmation in support asserted that Sarna was an owner of New Windsor.

An order dated September 21, 2007 resolved the motions between the parties. Pursuant to that order the controversy was resolved as follows:

> . . . 1. Motion granted as to New Windsor. The amended complaint is deemed served on New Windsor as of September 21, 2007.
>
> 2. Motion granted as to Blue Line only to the extent that the complaint shall be deemed a third party action brought by Mt. Airy and New Windsor against Blue Line as third party defendant. Said third party complaint to be deemed served as of September 21, 2007. . .

On October 24, 2007, Mt. Airy and New Windsor commenced a third-party action against Blue Line and served a notice pursuant to CPLR § 1007 on plaintiff. Attached to the notice pursuant to CPLR § 1007 third-party plaintiff's counsel annexed an affidavit of service indicating they served a third-party complaint, exhibits and third-party summons letter on Blue Line Drywall, Inc. Located at 500 US Highway 33, Englishtown, NJ 07726 by delivering the same to Maureen Poole an authorized agent of the corporation. Blue Line answered Mt. Airy and New Windsor's third-party complaint on or about January 11, 2008. On or about May 9, 2008, plaintiff served Blue Line with an amended summons and complaint naming Blue Line as a direct defendant.

Blue Line now moves this court to dismiss plaintiff's action as being time barred. The plaintiff opposes Blue Line's motion and cross-moves this court to renew his motion dated August 31, 2007 that sought to add Blue Line as a direct defendant. Blue Line offers no opposition to plaintiff's cross-motion.

Discussion

The court will discuss plaintiff's motion to renew first. The CPLR states:

> A motion for leave to renew:
>
> 1. shall be identified specifically as such;
> 2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
> 3. shall contain reasonable justification for the failure to present such facts on the prior motion.[1]

While plaintiff fails to specifically state the new facts not offered on the prior motion, this court takes judicial notice of the fact that the third-party action between Mt. Airy and New Windsor against Blue Line did not exist. As such this court absolves plaintiff of the requirement to demonstrate reasonable justification for his present these facts in his initial motion. Plaintiff motion for leave to renew is granted.

Plaintiff argues that the "relation back" doctrine must be employed in this case. Plaintiff contends that new evidence now exists that demonstrates that Blue Line is united in interest with the other defendants.

The Court of Appeals held in *Buran v. Cupal* that a party seeking to utilize the "relation

[1] CPLR § 2221(e).

back" doctrine must demonstrate:

> (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 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.[2]

The plaintiff satisfied the first prong of this test in that the causes of action asserted in the amended complaint against Blue Line arise out of the same fall from stilts as is asserted against the current defendants. The issue before the court is whether the defendants are united in interest. "Parties are united in interest when the interest of the parties in the subject matter is such that they will stand or fall together and that judgment against one will similarly affect the other."[3] In general, a court will find the unity of interest present where one of the parties is vicariously liable for another.[4]

To support his argument that Blue Line is united in interest with the other defendants the plaintiff attaches a subcontract agreement between New Windsor and Blue Line that states in pertinent part that:

> The undersigned, as Subcontractor shall indemnify, save and hold harmless New Windsor Development Co., LLC, and any related entities, agents and employees (hereinafter "you" or "your"), from and against claims, damages; losses and expenses, including but not limited to attorney's fees, fines, penalties and judgments arising out of or resulting from performance of my work, anyone directly or indirectly employed by me or anyone for whose acts

---

[2] *Buran v. Cupal*, 87 NY2d 173 [1995] (internal citations omitted).

[3] *Davis v. Larhette*, 39 AD3d 693, [2d Dep't 2007] (internal citations omitted).

[4] *See, Id.*, See also, *Austin v. Interfaith Med. Ctr.*, 264 AD2d 702 [2d Dep't 1999].

> they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.[5]

Blue Line offers no evidence to rebut plaintiff's argument. Based on the foregoing, this court finds that Blue Line is united in interest with the original defendants as a matter of law.

The court now turns its attention to the third and final prong of the "relation back" doctrine– 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.[6] In his original motion, the plaintiff argues that he failed to serve Blue Line initially because plaintiff does ". . . not speak English, [and] was a laborer employed by a twice-removed sub-contractor . . ." The plaintiff further proffers that his mistake is further based on the fact that ". . . the plaintiff did not know the identity of the general contract or the first sub-contractor. . ."

The Appellate Division, Second Department held that, "New York law does not require proof of an 'excusable' mistake, but only the existence of a mere mistake, on the part of the plaintiff seeking the benefit of the relation back doctrine."[7] As such the court finds that the plaintiff satisfied the third and final prong of the "relation back" doctrine.

Absent any opposition by Blue Line to the plaintiff's cross-motion, upon renewal this court finds that the plaintiff is entitled to utilize the "relation back"doctrine to add Blue Line as a direct defendant in this action. As such, the plaintiff's cause of action is not barred by the statute of limitation.

In light of the court's findings with respect to the plaintiff's cross-motion to renew, Blue Line's motion to dismiss plaintiff's cause of action as being time barred is denied.

---

[5] Plaintiff's Exhibit B.

[6] *Buran v. Cupal*, 87 NY2d 173 [1995] (internal citations omitted).

[7] *Davis v. Larhette*, 39 AD3d 693 [2d Dep't 2007](internal citations omitted).

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss the plaintiff's complaint as being time barred is denied; it is further

ORDERED, that the plaintiff's cross-motion for leave to renew his motion dated August 31, 2007 is granted, upon renewal plaintiff's motion to add Blue Line as direct defendant is granted in its entirety; it is further

ORDERED, that the plaintiff shall serve Blue Line with a verified amended complaint by August 8, 2008; it is further

ORDERED, that the defendant, Blue Line shall answer the plaintiff's verified amended complaint by September 12, 2008; and it is further

ORDERED, that the status conference scheduled for **August 22, 2008 is adjourned to September 25, 2008 at 9:30 A.M. in DCM Part 3**.

ENTER,

DATED: July 22, 2008

Joseph J. Maltese
Justice of the Supreme Court