

Bryson v NYU Med. Ctr.
2009 NY Slip Op 32522(U)
October 7, 2009
Supreme Court, New York County
Docket Number: 100721/06
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. KAREN SMITH
Justice

PART 62

Brepon, Joseph

INDEX NO. 10072106

MOTION DATE _____

- v -

MOTION SEQ. NO. 01

NYU Medical Center

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is disposed pursuant to the attached memorandum decision and order.

FILED
OCT 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 10-8-09

KS.S
KAREN SMITH
J.S.C.

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

-----X

JOSEPH BRYSON,

Plaintiff,

-against-

Index no.: 100721/06

Motion seq.: 001

Motion date: 4/28/2009

DECISION AND ORDER

NYU MEDICAL CENTER and GILBERT PEREZ,
Defendants.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

Plaintiff Joseph Bryson’s motion to consolidate the instant action with a Bronx County action which was transferred in 2007 to New York County, discontinue the counterclaim in the transferred action as against City of New York (“the City”) and New York City Police Officers John Doe 1 and John Doe 2 (“the Officers”), and amend the complaint, is granted, in part, and denied, in part, as provided more fully below. Co-defendants NYU Medical Center (“the Medical Center”) and Gilbert Perez’s cross-motion to strike Mr. Bryson’s counterclaim in the newly-consolidated action is hereby granted, as provided more fully below.

This case arises from an altercation on January 27, 2005 between plaintiff Joseph Bryson and co-defendant Gilbert Perez. Bryson, a bus driver employed by Empire Bus Company, was picking up disabled children from a rehabilitation center at the premises of co-defendant the Medical Center, where Perez was employed as a security guard. Bryson alleges that after pulling his bus up to the circular driveway outside the rehabilitation center, he got out of the bus and was approached by Perez, who screamed, “the next time you drive so close to me, I’m going to f___ you up.” Bryson claims that Mr. Perez then blocked his path, shouldered him into the school bus and, among other things, judo-flipped him onto the ground, thereby causing injuries to Bryson which required leg surgery and an extended stay at co-defendant Medical Center.

Perez’s version of the story, recorded in a police report filed the day of the incident, diverges markedly from Bryson’s:

“...[Bryson] became verbally abusive to [Perez] at which time [Bryson] pushed [Perez] then grabbed [Perez’s] testicles causing complainant pain; [Bryson] then grabbed [Perez’s] chest pushing [Perez] to the ground causing [Perez’s] chain to become damaged.

Perez claims he injured his ankle during the incident.

During his stay at the hospital, Bryson was handcuffed to his bed, and police officers were posted outside his door; the officers, according to Bryson, prevented his wife from visiting him. At an arraignment on February 4, 2005, Bryson was charged with assault in the third degree, sexual abuse in the third degree, attempted assault in the third degree, and harassment in the second degree. Bryson claims that after being released from the hospital on February 8, 2005, he tried to file a criminal complaint against Perez, but was rebuffed by the police department. On November 14, 2005, all charges against Bryson were dismissed.

On November 1, 2005, Mr. Perez and his wife commenced an action in Bronx County against Bryson and his employers, *Gilbert Perez and Elizabeth Perez v. Empire Bus Company, AC Bus Company, Pride Bus Company, and Joseph Bryson*, Index No. 20210-06. The plaintiffs pled the following causes of action: negligence, assault and battery, violation of the NYS Human Rights Law and the NYC Administrative Code, as well as negligent hiring and retention and supervision as against the bus companies and loss of consortium on behalf of Mrs. Perez.

On May 17, 2006, Bryson interposed an answer and counterclaims in the Bronx action pursuant to CPLR § 3019 against Perez, adding the Medical Center, the City and the City’s police officers as defendants in the counterclaim.¹ The counterclaim, which adds Mrs. Bryson as a counterclaim plaintiff, contains the following causes of action against Perez and the Medical Center: negligence, intentional assault, false reporting, malicious prosecution, injury to reputation and character, and negligent hiring and supervision against the Medical Center. The counterclaim contains the following causes of action against the City and its police officers: lack of probable cause, false arrest and imprisonment, malicious prosecution, violation of the 4th and

¹The actions against the Medical Center and the City and its officers should have been brought as a third-party action but were instead brought as counterclaims, a maneuver which although unorthodox, is permissible under CPLR §3019, which provides that where “a person not a party is alleged to be liable a summons and answer containing the counterclaim or cross-claim shall be filed, whereupon he or she shall become a defendant.”

14th Amendments, violation of 42 U.S.C. § 1983, conspiracy, and loss of consortium. Neither the Medical Center nor Perez interposed an answer to the counterclaim.

On August 15, 2006, the Bronx Supreme Court denied Bryson's application for leave to serve a late notice of claim against the City as to his false arrest and imprisonment counterclaims, but granted leave to serve a late notice of claim on his malicious prosecution counterclaim. On September 19, 2006, a default judgment was entered against the co-defendant bus companies in favor of Perez in the Bronx action. On May 2, 2007, the Bronx County Supreme Court granted the City's motion to change venue and transferred the action and counterclaims ("the Bronx action") to New York County Supreme County.²

On January 19, 2006, four months prior to filing his counterclaims in the Bronx action, Bryson commenced the instant action, based on the same incident in New York County. ("the New York action"), alleging assault and battery against Perez, as well as negligent supervision and negligent hiring and retention on the part of the Medical Center, and asking for punitive damages against both defendants.

In this motion, Bryson seeks to 1) consolidate the Bronx action with the New York action, 2) discontinue the action as against the City and its officers, and 3) amend the pleadings to, *inter alia*, add, in the New York action, a loss of consortium claim on behalf of his wife, as well as malicious prosecution and false arrest claims against Perez and the Medical Center. The joint answer of the Medical Center and Perez contains a cross-claim seeking to dismiss the counterclaim in the Bronx action as against the Medical Center and Perez for failure to move for a default judgment within a year of their default.

As there is no opposition to the part of the motion seeking consolidation, that portion of the motion is granted.

While the City does not oppose Bryson's motion to discontinue the action against the City and its officers, the co-defendants argue that the City and its officers should be kept in the action because they are indispensable parties. Specifically, the co-defendants argue that "the

² The action was assigned a new index number, 403702-07.

City's actions in this case directly affect the defense of [the Medical Center] and Perez because once the City can establish probable cause [for the arrest of Bryson], Bryson's claims based on false arrest and malicious prosecution must be dismissed" as against the Medical Center as well.

The City replies that the Medical Center has no standing to object to a voluntary discontinuance by Bryson as against the City and that CPLR § 3120 provides various mechanisms for discovery of non-party witnesses and documents.

Under CPLR 3217(b), "an action shall not be discontinued by a party asserting a claim except upon order of the court and upon terms and conditions, as the court deems proper." A plaintiff should be able to discontinue the action at any time "unless substantial rights have accrued or his adversary's would be prejudiced thereby" (*Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 AD2d 857 [1st Dept. 1964]).

Here, it is possible that a discontinuance as against the City could prejudice the Medical Center and Perez in their defense of Bryson's malicious prosecution and false imprisonment claims, which is the fourth cause of action in Bryson's proposed amended pleadings, but which were not included in the initial pleadings three years ago. The danger of prejudice to the Medical Center and Perez is removed if the fourth cause of action, for malicious prosecution and false imprisonment, is struck from Bryson's proposed amended pleading. Thus, the portion of Bryson's motion which seeks to discontinue against the City and its officers is granted, upon the dismissal his claim for malicious prosecution and false imprisonment claims against Perez and the Medical Center.

The Medical Center and Perez, in the cross-motion to dismiss the counterclaim in the Bronx action, argue that Bryson abandoned the counterclaims as against Medical Center and Perez by failing to seek a default judgment within the statutory period of one year after Perez and the Medical Center defaulted in the Bronx action.

If a plaintiff fails to take proceedings for the entry of judgment within one year after a default, CPLR § 3215(c) provides that "the court shall not enter judgment but shall dismiss the complaint as abandoned...upon its own initiative or on a motion, unless sufficient cause is shown why the complaint should not be dismissed." CPLR § 3215(c) applies to defaults by counterclaim

plaintiffs (*See Clemente v. Clemente*, 50 AD3d 514 [1st Dept. 2008] [holding that “the motion court properly dismissed the wife’s counterclaim for a separation pursuant to CPLR 3215(c), since she failed to offer reasonable excuse”]).

The Brysons failed to enter a default judgment against Perez and the Medical Center for well over a year, and they have not offered “sufficient cause” to justify the delay. The excuse for this delay proffered by counsel is a glitch in the office’s record keeping. The Court finds this is not sufficient cause, and thus co-defendants’ cross-motion to dismiss the counterclaim in the Bronx action is granted.

The Medical Center and Perez argue that the proposed amended complaint should be denied because there is no affidavit from Bryson, but only from his attorney. The Medical Center further argues that the proposed amended complaint improperly contains a derivative action on behalf of Mrs. Bryson, which is barred by the statute of limitation, as the underlying incident took place over four years ago and the New York action was commenced more than three years ago.

In his reply, Bryson argues that his wife’s loss of consortium claim is dependant on the same transaction and series of occurrences as the timely claims asserted on behalf of Bryson, and thus co-defendants were on notice of the loss of consortium claims from the time the New York action was commenced in January 2006.

A party may amend its pleadings “at any time by leave of court” (CPLR 3025[b]). In the absence of prejudice or surprise resulting directly from the delay in seeking leave, an application for leave to amend should be granted, “unless the proposed amendment is palpably insufficient or patently devoid of merit” (*Lucido v. Mancuso*, 49 AD3d 220, 222 [2nd Dept. 2008]).

CPLR § 203(f) provides that “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” The Third Department has held, in the context of an action arising from an automobile accident, that a derivative claim for loss of consortium “relates to the same series of events as the original complaint,” and thus leave to amend the complaint to add the loss consortium claim was properly granted, despite the relevant

statute of limitations, in the absence of an interposition back to the date of the original complaint, having run (*Anderson v. Carney*, 161 AD2d 1002 [3rd Dept. 1990]). While the First Department has denied a plaintiff's application to amend the complaint to add a loss of consortium claim, in that case discovery had been completed and no explanation for the lengthy delay was provided in plaintiff's affidavit (*Williams v. New York University Hospital*, 88 AD2d 540 [1st Dept. 1982]).

Here, it has been over three and a half years since Bryson commenced the New York action. Unlike the plaintiff in *Williams*, Bryson offers an excuse for his lengthy delay: a change of counsel in 2008 followed by a serious medical condition which kept his current counsel from taking action prior to submitting the present motion. With respect to the derivative claim of Mrs. Bryson, co-defendants are not prejudiced by its inclusion because her claim relates to the underlying altercation, and because, unlike the posture in *Williams*, discovery has not yet been completed. Moreover, there is no surprise here because the counterclaim in the Bronx action contained a derivative claim on behalf of Mrs. Bryson.

As discussed above, the malicious prosecution and false imprisonment claims, the fourth cause of action Bryson's proposed amended pleadings, would prejudice the Medical Center. As a result, the portion of Bryson's motion which seeks to amend the pleadings is granted, except for the fourth cause of action, which is struck from the pleadings.

Accordingly, it is

ORDERED that plaintiff Joseph Bryson's motion to consolidate is granted to the extent of consolidating the instant action with *Gilbert Perez and Elizabeth Perez v. Empire Bus Company, AC Bus Company, Pride Bus Company, and Joseph Bryson*, Index No. 403702-07, solely for the purposes of discovery and joint trial; and it is further

ORDERED that upon the filing of notes of issue and statements of readiness in each of the above actions and payment of the appropriate calendar fees; and upon service of a copy of this order with notice of entry on the Clerk of the Trial Support Office, said Clerk shall place the aforementioned actions upon the trial calendar for a joint trial only; and it is further

ORDERED that co-defendants NYU Medical Center and Gilbert Perez's cross-motion to dismiss the counterclaim in *Gilbert Perez and Elizabeth Perez v. Empire Bus Company, AC Bus Company, Pride Bus Company, and Joseph Bryson* as against them is granted; it is further

ORDERED that plaintiff Joseph Bryson's motion to discontinue the action as against the

City of New York and New York City Police Officers "John Doe 1" and "John Doe 2" is granted as specified above; it is further

ORDERED that plaintiff's Joseph Bryson's motion for leave to amend the complaint herein is granted, except as to the fourth cause of action, which is hereby struck from the pleading, and plaintiff shall serve all parties with amended complaint as provided herein, within the next twenty (20) days.

ORDERED that co-defendants shall serve an answer to the amended complaint within 20 days from the date of said service.

The foregoing constitutes the decision and order of this court.

Dated: October 7, 2009

ENTER:



Hon. Karen S. Smith, J.S.C.

FILED
OCT 13 2009
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NEW YORK