Lomonaco v Big H Huntington LLC
2010 NY Slip Op 33685(U)
December 27, 2010
Supreme Court, New York County
Docket Number: 103362/08
Judge: Paul Wooten
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SCANNED ON 1/19/2011
[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANNA LOMONACO and ANTHONY LOMONACO,

Plaintiffs,

- v -

BIG H HUNTINGTON LLC., REALTY INVESTORS BIG "H" ASSOCIATES, L.P., CHRISTENSEN COMPANY, K MART MANAGEMENT CORPORATION, K MART CORPORATION, K MART HOLDINGS CORPORATION, SEARS HOLDINGS CORPORATION, and SEARS HOLDINGS MANAGEMENT CORPORATION,

Defendants.

INDEX NO. 103362/08

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

FILED
JAN 19 2011
NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3 were read on the motion by defendants K Mart Management Corporation, K Mart Corporation, K Mart Holdings Corporation, Sears Holdings Corporation, and Sears Holdings Management Corporation to dismiss the complaint as against them.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

BACKGROUND

This is a personal injury action brought by plaintiff Anna Lomonaco for damages allegedly sustained from falling on or about April 4, 2005 in an area right outside of a K Mart store located at 839 New York Avenue in Huntington, New York. Her husband asserts a derivative cause of action for loss of consortium. Plaintiff commenced the original action by filing a summons and complaint on defendants K Mart of NY Holdings, Inc., Big H Huntington LLC., Realty Investors Big "H" Associates, L.P., and Christensen Company on or about February 6, 2008 under the Index No. 011175/2007 (Defendants Affirmation exhibit B).

On or about November 7, 2008, K Mart of NY Holdings, Inc. filed a motion to dismiss the complaint[1] (Defendants' Affirmation ¶ 5). Co-defendant Realty Investors Big H Associates submitted a copy of the lease for K Mart Store #9381 in Huntington made as of September 9, 1998 between defendant Realty Investors Big H Associates and K Mart Corporation (Defendants' Affirmation ¶ 5, exhibit A). On or about June 1, 2009 the motion was granted by Justice Stallman of the Supreme Court, New York County, and the complaint was severed and dismissed against K Mart of NY Holdings, Inc. on the basis that it was not a party to the lease or its amendments, and it does not own, lease, maintain, operate or control the premises where plaintiff allegedly fell (*Id*). The court also dismissed the cross-claims of co-defendant Realty Investors Big "H" Associates against K Mart of NY Holdings, Inc. (*Id*).

In an order dated October 26, 2009, Justice Stallman granted plaintiffs a default judgment against defendant Christensen Company, and gave plaintiffs leave to amend their summons and complaint to add defendants K Mart Management Corporation, K Mart Corporation ["K Mart Corp.], K Mart Holdings Corporation, Sears Holdings Corporation, and Sears Holdings Management Corporation [collectively "Movants"] to the action (Plaintiffs' Opposition exhibit E).

On or about April 20, 2010, plaintiff served a Supplemental Summons and Amended Complaint on Movants as primary defendants in the original action under Index No. 103362/2008 for the personal injuries that plaintiff allegedly sustained on or about April 4, 2005. (Defendants Affirmation ¶ 6, exhibits C, D). Movants now make a pre-answer motion to dismiss pursuant to CPLR § 3211(a)(5) for failure to file the Supplemental Summons and Complaint within the statute of limitations; pursuant to CPLR § 3211(a)(1) as a defense based on documentary evidence; and pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

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[1]Plaintiffs also cross moved for leave to amend their summons and complaint to add movants as defendants, but the court denied this motion without prejudice because plaintiffs failed to attach the proposed amended pleading.

In their pre-answer motion Movants submit in support, *inter alia*: a copy of the pleadings; the decision and order by Justice Stallman, dated June 1, 2009; affidavit of David Halffield, the assistant secretary of K Mart Corp.; and a copy of the lease for K Mart store #9381 in Huntington, NY. In support, Movants assert three arguments. First, Movants claim they should be dismissed on the ground that plaintiffs' cause of action expired on April 5, 2008. Second, Movants allege they have a defense based on documentary evidence, that the lease to the subject premises, which establishes that the Movants excluding K Mart Corp., are not parties to the lease and they do not own, lease, manage, maintain, operate or control the premises where plaintiff fell. Lastly, Movants assert that the complaint does not state a cause of action upon which relief can be granted because plaintiffs are suing the wrong entities.

Plaintiffs oppose the motion on the ground that their claims are not time barred because the time for filing their amended summons and complaint relates back to the original summons and complaint for statute of limitations purposes. Additionally, plaintiffs allege that Movants, for the first time in reply, added an alternative relief of dismissal against the other moving defendants, excluding K Mart Corp. [hereinafter "Alternative Relief"]. Since the Alternative Relief was not included in the Notice of Motion, plaintiffs argue that it cannot be considered by the court.

In opposition, co-defendants Big H Huntington LLC and Realty Investors Big "H" Associates, L.P. [collectively "Big H"] assert that Movants' motion is premature as there are outstanding discovery demands to which Movants have not responded. Additionally, Big H argues that Movants may need to indemnify, defend, and/or hold harmless Big H in this litigation, however, that will only become clear after discovery is conducted.

Both plaintiffs and co-defendants Big H claim that Movants have waived their right to bring this motion, as these arguments should have been raised in response to plaintiffs' motion to amend. Additionally, they claim the Movants are seeking summary judgment under the guise of a CPLR § 3211(a) motion to dismiss.

CPLR § 3211(a) Motion to Dismiss Standards

CPLR §3211(a) provides:

(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

1. a defense is founded on documentary evidence; . . .
5. the action may not be maintained because of... statute of limitations
7. the pleading fails to state a cause of action[.]

When determining a CPLR § 3211(a) motion, "we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *Leon v Martinez*, 84 NY2d 83, 87, [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). "We also accord plaintiffs the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp*, 96 NY2d at 414).

Upon a 3211(a)(7) motion to dismiss for failure to state a cause of action, the "question for us is whether the requisite allegations of any valid cause of action cognizable by the state courts 'can be fairly gathered from all the averments" (*Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept. 1964], quoting *Condon v Associated Hosp. Serv.*, 287 NY 411, 414 [1942]). In order to defeat a pre-answer motion to dismiss pursuant to CPLR § 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *(Bonnie & Co. Fashions, Inc. v. Bankers Trust Co.,* 262 A.D.2d 188 [1st Dept.1999].)

Pursuant to CPLR § 3211(a)(1), in order to "prevail on a motion to dismiss based on documentary evidence, the documents relied upon must definitively dispose of plaintiff's claim" (*Bronxville Knolls v Webster Town Ctr. Pshp.*, 221 AD2d 248 (1st Dept. 1995); *Demas v 325 W. End Ave. Corp.*, 127 AD2d 476 [1st Dept 1986]). A CPLR § 3211(a)(1) "motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mut. Life Ins.*

Co., 98 NY2d 314, 326-27 [2002]).

Upon a 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of limitations, the initial burden is on the defendant to show that the claims against him are time barred by the applicable statute of limitations (*See Tristaino v Teitler*, 24 Misc.3d 1244(A) [2009]). Then, the burden shifts to the plaintiff to establish that the relation back doctrine applies (*Id*). "The relation back doctrine allows the claim asserted against the defendants in the amended filing to relate back to claims previously asserted originally for statute of limitation purposes" (*Richardson v Pascarella*, 841 N.Y.S.2d 823, [2007]). In order for the relation back doctrine to be operative, a three pronged test applies and a plaintiff must show that:

> (1) both claims arose out of the 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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against [him or her as well]" *L & L Plumbing & Heating v DePalo*, 253 A.D.2d 517, 518 [2d Dept. 1998].

DISCUSSION

As this is a pre-answer motion to dismiss, it must be taken as true that plaintiff Anna Lomonaco fell outside of the K Mart Store located at 839 New York Avenue in Huntington, NY and sustained injuries. It must also be taken as true that plaintiff Anthony Lomonaco has a derivative claim for loss of consortium. Even though Movants argue that plaintiffs are suing the wrong entities, plaintiffs' claims survive a motion to dismiss for failure to state a cause of action under CPLR §3211(a)(7), as the complaint raises cognizable legal theories.

However, pursuant to CPLR §3211(a)(1), Movants have a defense based upon the lease agreement on the premises where the plaintiff fell, which establishes that out of the 5 Movants, only K Mart Corp. is a party to the agreement. (Defendants' Affirmation exhibit E). The

lease conclusively refutes the factual allegations in plaintiffs' complaint which states that K Mart Management Corporation, K Mart Holdings Corporation, Sears Holdings Corporation, and Sears Holdings Management Corporation owned, leased, managed, maintained, operated and controlled the premises where plaintiff fell (Plaintiffs' Amended Complaint ¶¶ 19-24; 33-38; 41-46; 49-54).

Plaintiffs do not attack the validity of the lease agreement or provide any evidence showing that Movants excluding K Mart Corp. own, lease, manage, maintain, operate or control the premises where plaintiff fell. Plaintiffs only oppose this argument on the grounds that Movants cannot be dismissed as a group because K Mart Corp. is on the lease, and the above-referenced Alternative Relief cannot be considered as it was first raised by Movants in reply. It is true that new matters raised for the first time in a reply affidavit cannot be considered (*Alto v Firebaugh Realty Corp., N.V*, 33 A.D.3d 738 [2nd Dept. 2006]). However, the Alternative Relief was raised in Movants' original notice of motion and consequently it can be considered now.[2] Thus, Movants, excluding K Mart Corp. have a defense based on documentary evidence.

Movants seek to dismiss plaintiffs' amended summons and complaint under CPLR § 3211(a)(5), for failure to file the supplemental summons and complaint within the statute of limitations. Movants have met their burden by showing that Plaintiffs' claims expired on April 5, 2008 (Movants affidavit §10). Plaintiffs fail to offer evidence under the above-mentioned three part test to support their assertion that the relation back doctrine applies to their amended summons and complaint.

Despite this, the Court will apply the three-part test to the facts of this case. The first element is met as to all Movants because the claims asserted in the original summons and complaint and amended summons and complaint are identical (Movants' affirmation exhibits B, C). However, as to elements 2 and 3, plaintiffs fail to offer proof that Movants, excluding K Mart

[2]Movants' original affirmation in support states that Movants, excluding K Mart Corporation, should be dismissed because: they are not on the lease of the subject premises; they are not the owners of such premises; and they are separate and distinct legal entities from K Mart Corporation. (Defendants' Affirmation ¶¶ 16-19).

Corp. are united in interest with an original defendant such that they can be charged with notice of the original action, or that they knew or should have known they would be brought into the action "but for a mistake by plaintiff concerning the identity of the proper party" (*Tristaino v Teitler*, 24 Misc.3d 1244(A) [2009], *supra*). Since all three elements of the three-prong test must be met for the relation back doctrine to apply, the amended summons and complaint do not relate back for statute of limitations purposes against Movants, excluding K Mart Corp., and consequently are time barred.

Since the claims asserted by plaintiff Ana Lomonaco cannot be sustained against Movants except K Mart Corp., the law does not allow her husband's derivative action for loss of consortium. (*Rivera v City of New York*, 30 A.D.3d 334, 344 [1st Dept 2007] *see also Belanoff v Grayson*, 98 A.D.2d 353, 358 [1st Dept 1984]). Accordingly, we must dismiss Anthony Lomonaco's cause of action as against those Movants as well (*Id*).

As for K Mart Corp., applying element 2 of the three-part test, the lease establishes that unity of interest exists between it and Realty Investors Big "H" Associates (an original defendant) as they have a leasee-leasor realtionship, such that K Mart Corp. can be charged with notice of the original action. As to element 3 of the three-prong test, K Mart Corp., as leasee to the subject premises, knew or should have known that it would be named as a defendant in the underlying case. All three prongs of the three-part test for the relation back doctrine are met as to defendant/movant K Mart Corp. Thus, plaintiffs' claims against K Mart Corp. relate back to the original summons and complaint and are not time barred.

Both plaintiffs and Big H assert that Movants waived their right to bring the instant motion because they did not oppose plaintiffs' motion to amend their pleadings naming Movants as additional defendants. However plaintiffs failed to provide the Court with evidence, such as an affidavit of service or other proof pursuant to CPLR § 306, that a copy of the motion to amend was ever mailed or otherwise served upon the Movants giving notice of said motion. Accordingly, this argument is unpersuasive.

Defendants Big H argue that the instant motion is premature because there are outstanding discovery requests to which Movants have not yet responded, and in support cites case law where pre-discovery motions for summary judgment were denied. We note that the Court will not treat Movants' pre-discovery motion to dismiss as a motion for summary judgment as allowed under CPLR § 3211(c), as this action does not exclusively involve issues of law, and Movants did not clearly reveal their proof nor did they clearly chart a summary judgment course (*See Huggins v Whitney*, 239 A.D.2d 174 [1st Dept. 1997]). Consequently Big H's arguments and case law on this point are not persuasive.

For these reasons and upon the foregoing papers, it is,

ORDERED that Movants' motion to dismiss plaintiffs' complaint pursuant to CPLR § 3211(a)(5), (7), and (1) is granted only as to defendants K Mart Management Corporation, K Mart Holdings Corporation, Sears Holdings Corporation, and Sears Holdings Management Corporation, and it is further,

ORDERED that the defendants shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: December 27, 2010

Enter:

PAUL WOOTEN J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: : ☐ **DO NOT POST** ☐ **REFERENCE**

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