Kirilcuk v Riverwalk Place, LLC
2011 NY Slip Op 30935(U)
April 11, 2011
Supreme Court, New York County
Docket Number: 115359/07
Judge: Doris Ling-Cohan
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

[* 1]
SCANNED ON 4/13/2011

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

PRESENT: **JUSTICE DORIS LING-COHAN** PART 36

Justice

Kirilcuk, Viera,

INDEX NO. 115359/07

MOTION DATE

- v -

MOTION SEQ. NO. 002

Riverwalk Place

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/~~for~~ vacate

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	5
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No 3, 4

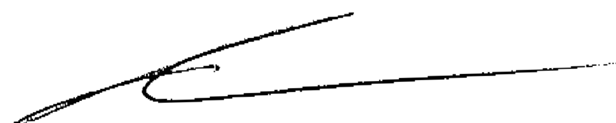
Upon the foregoing papers, it is ordered that this motion and cross motion are decided in accordance with the attached memorandum decision.

FILED

APR 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/11/11



JUSTICE DORIS LING-COHAN

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

---X

VIERA KIRILCUK,

Plaintiff,

-against-

RIVERWALK PLACE, LLC and MONADNOCH CONSTRUCTION, INC.,

Defendants.

---X

Index No. 115359/07

Motion Seq. No. 002

DORIS LING-COHAN, J.:

Defendants move to vacate the Court's order dated September 8, 2010, pursuant to CPLR 5015(a)(1), which granted plaintiff's motion to amend the complaint to add parties, on default, and upon vacating, denying plaintiff's motion. Plaintiff cross-moves for a default judgment against the newly added parties, The Related Companies, Riverwalk Landing, LLC a/k/a Southtown Associates 4 LLC, and Riverwalk Landing Fee Company, LLC, pursuant to CPLR 3215.

This case arises out of an accident which occurred on April 10, 2006, in which plaintiff allegedly tripped and fell as a result of a drainage grating on Main Street in Roosevelt Island, New York. Plaintiff commenced this action against defendant Riverwalk Place, LLC, which allegedly was and is the owner of 455 Main Street where plaintiff fell, and defendant Monadnoch Construction, Inc., which was allegedly hired to do construction work on the property. Following the deposition of defendant Riverwalk Place, LLC, wherein Kelley Hattrich was produced and testified that it appeared from the photographs presented to her that plaintiff fell on the property adjacent to Riverwalk Place, LLC, plaintiff moved to amend the complaint, by

Notice of Motion dated August 11, 2010, to add defendants Related Companies, Riverwalk Landing, LLC, a/k/a South Town Associates 4, LLC and Riverview Landing Fee Company, LLC. The motion was submitted without opposition and granted on default.

Defendants now move to vacate such order, pursuant to CPLR 5015, arguing that there is a reasonable excuse for their default and, thus, the granting of plaintiff's motion to amend should be vacated and should be decided on the merits instead. CPLR 5015(a)(1) provides that "[t]he court which rendered a judgment or order may relieve a party from it upon such terms as may be just . . . upon the ground of excusable default." Defendants assert that, due to law office failure, opposition was not submitted to the prior motion. Specifically, defendants' counsel contends that he failed to timely submit opposition to the motion due to his wife's emergency surgery, followed by his scheduled vacation. Counsel states that due to an oversight, he was unaware that the motion would be returnable during his absence. As further proof of the law office failure, counsel submits the affidavit of the substitute calendar clerk at the law firm who replaced the usual calendar clerk on that date while she was out. *See* Marc Silverstein Affirmation, Exh E. Although defense counsel erred in failing to request an adjournment, it is undisputed that plaintiff's counsel had earlier stated that he would consent to an adjournment, should defendants' counsel need one. Thus, based on the fact that defendants' counsel has shown a reasonable excuse, and defendants appear to have a meritorious opposition, as discussed below, the prior motion is vacated and should be decided on the merits.

In the prior motion, plaintiff requested leave to amend its pleadings to add defendants The Related Companies, Riverwalk Landing, LLC, a/k/a South Town Associates 4, LLC and Riverview Landing Fee Company, LLC. It is undisputed that the Statute of Limitations has since

run on this negligence action. However, plaintiff argues that the doctrine of relation back applies, which holds that, even in instances where the Statute of Limitations has run with respect to unnamed parties, . . . the unnamed parties [may be] joined if they are determined to be 'united in interest' with the party against whom process was actually served." *Cruz v Vinicio*, 259 AD2d 294, 295 (1st Dep't 1999).

In *Mondello v New York Blood Center - Greater New York Blood Program*, 80 NY2d 219, 226 (1992), the Court of Appeals adopted the three-part test enunciated in *Brock v Bua*, 83 AD2d 61, 69 (2d Dep't 1981), for determining the conditions that must be satisfied in order for claims against one defendant to relate back to claims asserted against another:

> (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 the additional party united in interest as well.

As it is undisputed that the Statute of Limitations has since expired, "the burden shift[s] to the plaintiff to establish the applicability of the relation-back doctrine." *Xavier v RY Mgmt. Co., Inc.*, 45 AD3d 677, 678 (2d Dep't 2007); *see Raymond v Melohn Properties, Inc.*, 47 AD3d 504, 504 (1st Dep't 2008).

Plaintiff moved to add the proposed defendants, arguing that the relationship of those entities to the real property where plaintiff suffered her injuries was not ascertained until the deposition of defendant Riverwalk Place, LLC's witness, Kelley Hattrich, who is District

Manager of The Related Companies ("Related"). Plaintiff contends that the proposed defendants are united in interest with the named defendant Riverwalk Place, LLC. Plaintiff contends that, as there is no signage distinguishing the Riverwalk Place and Riverwalk Landing real properties as separate properties, both are owned by the same entity and both are managed by Related, the motion should be granted since one or both of those entities may be responsible for maintaining the area where plaintiff fell.

Defendants contend that 455 Main Street, the location of defendant Riverwalk Place, LLC, and 425 Main Street, the location of Riverwalk Landing, LLC where plaintiff actually fell, are separate and distinct sites. Although the two properties are managed by the same company, Related, each was developed separately under separate construction management agreements and are entirely separate entities as separate corporations. Kelley Hattrich Aff ¶ 9-11 (attached as Exh M to Silverstein Affirmation). With regard to Southtown Associates 4, LLC, defendants assert that it was the prior name of Riverwalk Landing, LLC, which was changed September 16, 2005, prior to plaintiff's accident. *See* Silverstein Affirmation, Exh Q. With regard to Riverwalk Landing Fee Company, LLC, defendants assert that this entity was formed to receive developer fees and did not have any ownership interest in 425 Main Street. Thus, defendants contend that the proposed defendants are not united in interest with defendant Riverwalk Place, LLC because the separate and distinct entities will not stand or fall together.

In deciding whether two parties are united in interest, the Court of Appeals has looked at whether the interest of the two parties "in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." *Mondello*, 80 NY2d at 226 (internal quotations and citations omitted). Moreover, "[i]n a negligence action, the defenses

available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other." *Xavier*, 45 AD3d at 679 (internal quotations omitted). "More is required than a common interest in the outcome." *27th Street Block Assn v Dormitory Auth. of the State of New York*, 302 AD2d 155, 165 (1st Dep't 2002).

As for the first condition, it is clear that the claims already asserted and the new claims plaintiff is attempting to assert against the additional defendants all arise out of the same occurrence, that is, plaintiff's trip and fall. With regard to the second condition, however, plaintiff has not demonstrated that the parties are "united in interest" sufficient to charge the new, proposed defendants with notice of the action. Other than simply alleging that the parties are united in interest, based on the fact that defendant Riverwalk Place, LLC produced a witness who is employed by Related, and that either Riverwalk Place, LLC or Riverwalk Landing, LLC would be responsible for plaintiff's accident since it was unclear to plaintiff which entity owned the area in question, plaintiff has not demonstrated that the parties will "stand or fall together." *Xavier*, 45 AD3d at 679. Nothing in the record indicates that the proposed defendants are vicariously liable for the acts of each other. *See id.*

Further, with regard to Related, "[t]he fact that two defendants may share resources such as office space and employees is not dispositive." *Id.* Although plaintiff relies, in part, on the fact that Kelley Hattrich, District Manager of Related, appeared for a deposition as defendant Riverwalk Place, LLC's witness, such interconnectedness, by itself, is insufficient to find the parties united in interest. "Although [the two defendants] may share commonalities, including shareholders and officers, that in and of itself is not sufficient to establish that the two entities are united in interest." *Raymond*, 47 AD3d at 505. "The managing agent of the premises where the

plaintiff allegedly was injured, and . . . the owner, have different defenses [and] a judgment against one would not affect the other." *Id.*, *see also Raymond*, 47 AD3d at 505. Thus, plaintiff has not demonstrated that the parties are united in interest for the purposes of the relation back doctrine and, as it is undisputed that the Statute of Limitations has run, plaintiff's motion to amend and add the proposed defendants is denied. As a result, plaintiff's cross motion for a default judgment against the proposed defendants is now moot.

Although both parties detailed plaintiff's steps or lack thereof in determining the proper parties during the course of the lawsuit, whether plaintiff had reason to believe that defendant Riverwalk place, LLC was the owner of the property where plaintiff fell does not have any bearing on a determination of whether relation back applies. The three prongs that must be satisfied in order for claims against one defendant to relate back to claims asserted against another are set forth in *Mondello v New York Blood Center - Greater New York Blood Program*, 80 NY2d 219, 226 (1992), which does not include steps taken by plaintiff in determining the proper parties.

Accordingly, it is

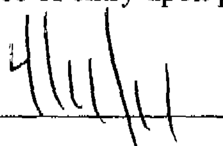
ORDERED that defendants' motion to vacate the Court's order dated September 8, 2010, is granted and plaintiff's prior motion to amend the complaint to add parties The Related Companies, Riverwalk Landing, LLC a/k/a Southtown Associates 4 LLC, and Riverwalk Landing Fee Company, LLC is denied; and it is further

ORDERED that plaintiff's cross motion for a default judgment against The Related Companies, Riverwalk Landing, LLC a/k/a Southtown Associates 4 LLC, and Riverwalk Landing Fee Company, LLC is denied; and it is further

[* 8]

ORDERED that defendants shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 158 of 60 Centre Street) and the County Clerk (Basement of 60 Centre Street), who are directed to amend their records to reflect the deletion of Related Companies, Riverwalk Landing, LLC a/k/a Southtown Associates 4, LLC and Riverwalk Landing Fee Co., LLC in the caption herein; and it is further

ORDERED that within 30 days of entry of this order, defendants shall serve a copy of this order with notice of entry upon plaintiff.

Dated: 

DORIS LING-COHAN, J.S.C.

J:\Relation BackStat of Lims\Kirilcuk, vacate order allowing relation back.wpd

FILED

APR 13 2011

NEW YORK
COUNTY CLERK'S OFFICE