

Verizon N.Y., Inc v City of New York

2011 NY Slip Op 31341(U)

May 20, 2011

Supreme Court, New York County

Docket Number: 109087/07

Judge: Cynthia S. Kern

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

CYNTHIA S. KERN
J.S.C.

PRESENT:

PART 52

Index Number : 109087/2007

VERIZON NEW YORK

vs

CITY OF NEW YORK

Sequence Number : 002

AMEND PLEADINGS

INDEX NO. 109087/07

MOTION DATE _____

MOTION SEQ. NO. 02

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 decided in accordance with the attached decision.

FILED

MAY 23 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/20/11

CSK

CYNTHIA S. KERN J.S.C.

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----x
VERIZON NEW YORK INC.,

Plaintiff,

Index No. 109087/07

-against-

DECISION/ORDER

CITY OF NEW YORK, TODINO BROTHERS
RECYCLING, INC., TODINO SEWER & WATER SV.
INC., F. TODINO & SONS RECYCLING, INC., FRED
TODINO SEWER & WATER SERVICE, INC. and
FRED TODINO & SONS, INC.,

Defendants.

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u> </u>
Affirmations in Opposition to the Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>2</u>
Exhibits.....	<u>3</u>

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Plaintiff commenced the instant action to recover for property damage allegedly sustained by plaintiff's underground facilities in the borough of Manhattan in June 2006. Plaintiff now moves for an order amending the caption and complaint to add FCV Sewer & Water, Inc. ("FCV") as a defendant in the instant action. For the reasons set forth below, plaintiff's motion is denied as time-barred.

The relevant facts are as follows. Plaintiff commenced the instant action on July 2, 2007 to recover for property damage allegedly sustained by plaintiff's underground facilities on or about June 14, 2006. Plaintiff alleges that the property damage occurred underground in the vicinity of the northeast corner of West 157th Street and Frederick Douglass Boulevard (8th Avenue) in the borough of Manhattan. The City of New York (the "City") appeared and answered the complaint on or about September 2, 2007, and Todino Brothers Recycling, Inc., Todino Sewer & Water Sv. Inc., F. Todino & Sons Recycling, Inc., Fred Todino Sewer & Water Service, Inc. or Fred Todino & Sons, Inc. (hereinafter "the Todino defendants") appeared and answered on or about February 22, 2008.

During the discovery process, plaintiff made numerous attempts to obtain applications for permits for work, paving and/or street openings from the City as a party defendant as well as through FOIL requests for work done in the underground area at issue. In November 2009, the City provided Department of Transportation documents identifying FCV as the entity that had applied for and was granted a permit to open the street in front of 2960 Frederick Douglass Blvd. Plaintiff alleges that this was the first time it learned of the existence of FCV, over four months after the expiration of the three year statute of limitations. Plaintiff now requests that, pursuant to the relation back doctrine, it be allowed to amend its complaint and caption to add FCV as a party defendant in this matter over one year after the statute of limitations has expired.

"As codified in New York's Civil Practice Law and Rules...the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are 'united in interest.'" *Buran v. Coupal*, 87 N.Y.2d 173, 177 (1995). The Court of

Appeals has held that this doctrine, which is “[a]imed at liberalizing the strict, formalistic pleading requirements of the past century...while at the same time respecting the important policies inherent in statutory repose...enables a plaintiff to correct a pleading error - by adding either a new claim or a new party - after the statute of limitations period has expired.” *Id.* In order to add a new party as a defendant when the statute of limitations has run, three conditions must be satisfied for the claims against the new defendant to relate back to the claims asserted against an existing defendant. *Id.* at 178. A new defendant can be added after the statute of limitations has expired if:

- (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.

Id. (citing *Brock v. Bua*, 83 A.D.2d 61 (2d Dept 1981)).

In the instant action, plaintiff has not shown that the claims against FCV relate back to the claims against the Todino defendants. As an initial matter, it is undisputed that the claims against the Todino defendants arise out of the same conduct, transaction or occurrence as plaintiff’s claims against FCV. However, plaintiff fails to meet the second prong of the three-factor test - that FCV must be “united in interest” with the Todino defendants. In order for a potential defendant to be considered “united in interest” with an existing defendant, the two parties must share the same jural relationship in the action and one defendant must be vicariously liable for the acts of the other. *See Raschel v. Rish*, 69 N.Y.2d 694 (1986); *see also Zehnick v.*

Meadowbrook II Associates, 20 A.D.3d 793 (3d Dept 2005).

To share the same jural relationship, the relationship between the existing defendant and the potential defendant must be “such that they stand or fall together and that judgment against one will similarly affect the other.” *Prudential Ins. Co. v. Stone*, 270 N.Y. 154 (1936). The fact that the two parties may share a multitude of commonalities, including employees, is immaterial as the unity of interest test will only be met if they share the same jural relationship. See *Zehnick*, 20 A.D.3d 793. If the parties are separate and distinct business entities, even if “controlled by the same principal and operate as a single unit,” they have “no jural relationship other than that of alleged joint tort-feasors.” *Capital Dimensions, Inc. v. Samuel Oberman Co., Inc.*, 104 A.D.2d 432, 33 (2d Dept 1984). Furthermore, in order to have unity of interest, one party must be vicariously liable for the acts of the other, meaning that the relationship between the two parties must be such that both parties have identical interests and defenses in the action. See *Xavier v. RY Management Co., Inc.*, 45 A.D.3d 677 (3d Dept 2007).

This court cannot say that the Todino defendants and FCV are united in interest as plaintiff has not shown that the two parties maintain the same jural relationship and that one is vicariously liable for the acts of the other. Although plaintiff asserts that FCV and the Todino defendants are “united in interest” because Christopher Todino, a co-owner of Todino Sewer & Water, a Todino defendant, along with other members of the Todino family, was an employee of FCV on the date of the alleged incident, this argument is without merit. While FCV and the Todino defendants might share commonalities, including employees, there is no evidence that they maintain the same jural relationship. FCV and the Todino defendants are separate and distinct business entities and thus, the only relationship they maintain is that of alleged joint tort-

feasors. Furthermore, there is no evidence suggesting that FCV and the Todino defendants are vicariously liable for the acts of the other as they have separate interests in the action, and thus, have different defenses. There is no evidence that FCV is an agent of any of the Todino defendants. Moreover, merely sharing an employee such as Christopher Todino does not create this vicarious liability relationship. Additionally, plaintiff's reliance on *DeSanna v. Rockefeller Center, Inc.*, 9 A.D.3d 596 (3d Dept 2004) is misplaced as that case is distinguishable. In *DeSanna*, the plaintiff untimely commenced an action against the owner of the building in which she fell, having mistakenly commenced the action against the building's property manager instead. In that case, unlike the present case, there was an agency relationship between the two parties, thereby making the owner of the building liable for the acts of its property manager. Thus, a vicarious liability relationship existed for purposes of the "united in interest" test.

Finally, even if FCV and the Todino defendants were found to be "united in interest," plaintiff has failed to prove the third prong of the three-factor test. To prove this last prong, plaintiff must show that FCV knew or should have known that but for plaintiff's mistake, the action would have been brought against it as well. To prove this knowledge on the part of FCV, plaintiff must show that FCV is a successor of the Todino defendants, and as such, FCV had notice of the potential claim. *See Ward v. Terry & Tench Const. Co.*, 118 A.D. 80 (1st Dept 1907). However, plaintiff has failed to provide any evidence that FCV is a successor company of the Todino defendants.

Accordingly, because plaintiff has not demonstrated that FCV and the Todino defendants are "united in interest" or that FCV knew that but for plaintiff's mistake the action would have been brought against it, plaintiff's motion to amend the caption and complaint to add FCV as a

