

Spinelli v Vornado Burnside Plaza, LLC

2011 NY Slip Op 32042(U)

July 11, 2011

Supreme Court, Nassau County

Docket Number: 11392/08

Judge: Karen V. Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____x

ANGELA SPINELLI,

Plaintiff(s),

Index No. 11392/08

-against-

**Motion Submitted: 5/4/11
Motion Sequence: 005**

**VORNADO BURNSIDE PLAZA, LLC, VORNADO
REALTY TRUST, STOP & SHOP
SUPERMARKET, TRI-RAIL CONSTRUCTION &
ATLAS ASPHALT,**

Defendant(s).

_____x

TRI-RAIL CONSTRUCTION,

Third-Party Plaintiff(s),

-against-

ATLAS ASPHALT,

Third-Party Defendant(s).

_____x

VORNADO BURNSIDE PLAZA, LLC,

Second Third-Party Plaintiff(s),

-against-

ATLAS ASPHALT,

Second Third-Party

Defendant(s).

_____x

The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
 Answering Papers.....X
 Reply.....X
 Briefs: Plaintiff's/Petitioner's.....
 Defendant's/Respondent's.....

Defendant Atlas Asphalt ("Atlas") moves this Court for an order dismissing the complaint against it, pursuant to CPLR § 3211(a)(5), on the ground that the action was not brought within the required three-year time period prescribed in the statute of limitations applicable to personal injury actions. Plaintiff opposes the requested relief. None of the other parties to this action has taken a position on the instant motion.

Plaintiff alleges that, on August 30, 2007, she sustained personal injuries as the result of tripping and falling in a parking lot outside of a Stop & Shop Supermarket. Plaintiff further alleges that she was caused to trip and fall due to a hazardous and dangerous condition in the parking lot of that location.

Vornado Burnside Plaza, LLC ("Vornado") is the landlord of the property, and Stop & Shop is a tenant of the shopping plaza.¹ Vornado hired defendant Tri-Rail Construction ("Tri-Rail") to repave the parking lot. The sub-contractor who actually performed the paving work is Atlas.

The original action was initially commenced in 2008. The supplemental summons and verified amended complaint was filed with the Nassau County Clerk on March 1, 2010, and named Vornado, Vornado Realty Trust, Stop & Shop and Tri-Rail. Thereafter, on or about November 5, 2010, Tri-Rail commenced a third-party action against Atlas. On or about December 14, 2010, Vornado commenced a second third-party action against Atlas. Both third-party actions against Atlas allege, in sum and substance, that Atlas was negligent in the performance of the repaving of the parking lot, and that plaintiff's alleged injuries are not due to the negligence of either third-party plaintiff. Tri-Rail also alleges in its third-party complaint that Atlas agreed to indemnify Tri-Rail and hold it harmless pursuant to the terms of a written contract between them.

¹This Court granted Vornado Realty Trust's dismissal motion by Decision and Order dated February 22, 2010. In that same Order, the Court denied Vornado Plaza's motion for summary judgment on the issue of contractual indemnity, and granted Stop and Shop's motion for an Order obligating Vornado Plaza to defend and indemnify Stop & Shop.

Plaintiff commenced her action against Atlas after the statute of limitations had expired, on or about March 3, 2011, by service of a supplemental summons and amended complaint upon Atlas. The supplemental and amended pleadings were filed with the Court on March 7, 2011. Atlas has not interposed an answer to plaintiff's supplemented and amended pleadings, but has brought the instant motion.

Plaintiff does not dispute that the three-year statute of limitations period for personal injury actions, as prescribed by CPLR § 214(5), has expired; instead, plaintiff opposes Atlas' motion on the ground that the relation-back doctrine applies in this case, thereby saving her complaint against Atlas from dismissal pursuant to CPLR § 3211(a)(5). Specifically, plaintiff asserts that Tri-Rail and Atlas are "united in interest." In the alternative, plaintiff asserts that Atlas' motion is premature, as the relationship between Atlas and Tri-Rail has not been fully explored via the discovery process.

In order for a claim against one defendant to relate back to a claim asserted against another defendant, (1) both claims must have arisen out of the same conduct, transaction or occurrence; (2) the new party must be "united in interest" with the original defendant, such that the new defendant can be charged with notice of the commencement of the action and will not be prejudiced in maintaining a 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 the new party as well (*Buran v. Coupal*, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 638 N.Y.S.2d 405 (1995); *Mondello v. New York Blood Center*, 80 N.Y.2d 219, 226, 604 N.E.2d 81, 590 N.Y.S.2d 19 (1992); *CPLR § 203 [b]*).

The question of unity of interest is one of law, not of fact (*Connell v. Hayden*, 83 A.D.2d 30, 43, 443 N.Y.S.2d 383 [2d Dept., 1981]). Parties are considered to be united in interest for purposes of the relation-back doctrine when, because of some legal relationship between them, they necessarily have the same defenses to the plaintiff's claim (*Id.*). In actions for negligence, parties will be united in interest only where one party is vicariously liable for the acts of the other, which vicarious liability is imputed by reason of some relation existing between the parties (*Id.* at 45).

The "excusability" of the mistake referred to in the third prong of the aforementioned test is not an absolute requirement under New York law (*Buran*, 87 N.Y.2d at 179). That being established, plaintiff must still make some showing of a "mistake" concerning a prospective defendant's identity which precluded plaintiff from bringing an action against that defendant before the statute of limitations expired (*Stamatopoulos v. Salzillo*, 50 A.D.3d 885, 855 N.Y.S.2d 242 [2d Dept., 2008]).

Moreover, "where, *within the statutory period*, a potential defendant is fully aware

that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations” (emphasis added) (*Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473, 477, 488 N.E.2d 820, 497 N.Y.S.2d 890 [1985]). For example, when a third party has been served with the third-party complaint and all prior pleadings, the third-party defendant has actual notice of the plaintiff’s potential claim at that time; thus, “a direct claim asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint” (*Id.* at 478).

In this case, there is apparently no dispute that the claim asserted directly by plaintiff against Atlas in the amended pleadings arises from the same conduct, transaction or occurrence as the claim asserted by plaintiff against Tri-Rail.

In this case, it is also undisputed that the third-party action by Tri-Rail against Atlas was commenced after the expiration of the three-year statute of limitations period for personal injury actions. Plaintiff concedes that Atlas was not served with the third-party complaint until on or about November 5, 2010, over two months after the statute of limitations expired.

In support of its assertion that the relation-back doctrine applies here, plaintiff has submitted, *inter alia*, a small portion of Tri-Rail’s president’s deposition testimony. During his deposition, Charles Ventimiglia testified that Atlas actually performed the paving of the parking lot; however, even this testimony was taken almost one month after the statute of limitations expired. In any event, Mr. Ventimiglia’s deposition testimony fails to establish any relationship between Tri-Rail and Atlas whereby they can be said to be united in interest. According to Mr. Ventimiglia, Atlas was hired as a sub-contractor, pursuant to an individual purchase order, and that there was no “long-standing contract” between them. In addition, Mr. Ventimiglia could not recall if Atlas supplied Tri-Rail with a certificate of insurance prior to commencing the job. Mr. Ventimiglia was only able to offer testimony that one of Tri-Rail’s project managers would “supervise and/or inspect” Atlas’ work, but he could not definitively identify that person, and no evidence as to what, if any, direction and/or supervision that project manager provided to the paving project giving rise to this action was offered.

Aside from the deposition testimony, none of the correspondence submitted by plaintiff as Exhibit E, which letters are dated well prior to the expiration of the statute of limitations, were drafted by, or addressed to, Atlas. Furthermore, none of the letters mentions Atlas.

Moreover, plaintiff has failed to establish, or even assert, that there was any “mistake”

as to the identity of the proper parties. The Court notes that Tri-Rail's deposition was not conducted until September 28, 2010, after the statute of limitations expired. Even after it was discovered that Atlas was the sub-contractor who performed the paving work, plaintiff did not serve Atlas as a direct defendant for another five months. Thus, the failure to bring a timely claim directly against Atlas seems to be less the result of mistake than of failure to conduct discovery in a timely manner.

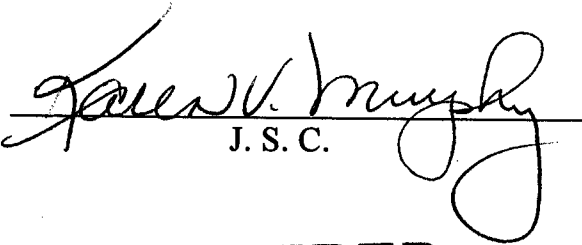
Plaintiff's assertion that Atlas' motion is premature is likewise unpersuasive. Plaintiff's mere hope that she may be able to discover some evidence regarding unity of interest between Tri-Rail and Atlas is insufficient to defeat Atlas' motion (*see Rinzler v. Jafco Associates*, 21 A.D.3d 360, 362, 800 N.Y.S.2d 719 [2d Dept., 2005]). This action has been pending since 2008, and plaintiff has had the opportunity to depose Tri-Rail's president, as outlined above.

Thus, since it appears that the relation-back doctrine does not apply in this case, and that Atlas "has been a complete stranger to the suit up to the point of the [service of the third-party complaint], the bar of the Statute of Limitations must be applied" (*Duffy*, 66 N.Y.2d at 477; *Rinzler, supra* [Court properly granted motion to dismiss the amended complaint because plaintiff did not attempt to add defendant until after the statute of limitations had expired]).

Defendant Atlas' motion to dismiss plaintiff's complaint against it as time-barred is granted.

The foregoing constitutes the Order of this Court.

Dated: July 11, 2011
Mineola, N.Y.


J. S. C.

ENTERED
JUL 14 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE