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

PRESENT: HON. PAUL WOOTEN Justice PART 7

GREATER NEW YORK MUTUAL INSURANCE COMPANY as subrogee of BAUMAN 34TH STREET, LLC, GOLDBERG 34TH STREET LLC, INC. and all other named insureds under policy number 1131M92017,

Plaintiffs,

- against-

COACH, INC. AND GATEWAY ENTERPRISES, INC.,

Defendants.

INDEX NO. 106354/08

MOTION SEQ. NO. 003

The following papers, numbered 1 to 9, were read on this motion by plaintiff for leave to add a party defendant and cross-motions by defendants by Coach, Inc. and Gateway Enterprises, Inc. for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3, 4, 5
Answering Affidavits — Exhibits (Memo)	6, 7
Replying Affidavits (Reply Memo)	8, 9

Cross-Motion: ■ Yes ☐ No

Before the Court is Greater New York Mutual Insurance Company's (plaintiff) motion, pursuant to CPLR 3025(b) and 1003, seeking leave to add LJG Construction, LLC (LJG) as a party defendant and serve a supplemental Summons and Amended Complaint. Also before the Court is a cross-motion by Gateway Enterprises, Inc. (Gateway) for summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint as against it as well as the cross-claim asserted against it by Coach, Inc. (Coach). Additionally, before the Court is a cross-motion by Coach, pursuant to CPLR 3212, for summary judgment dismissing defendant Gateway's cross-claim for indemnification and contribution as against it.

BACKGROUND

This is a subrogation action brought by plaintiff to recover monies paid out for a loss suffered by plaintiff's subrogors, Bauman 34th Street, LLC and Goldberg 34th Street, LLC, Inc.

(collectively, "B&G") from a fire which occurred on the roof of the building owned by B&G located at 516 West 34th Street, New York, New York (the building) on May 24, 2007. At the time of the incident Coach, a tenant of the building, occupied seven floors. Plaintiff alleges that Gateway was hired by Coach as a contractor to "stain/seal a wood roof deck and chairs at the building" and while this work was in progress a fire occurred (Notice of Motion at p. 2). B&G submitted a claim with plaintiff for the loss suffered as a result of the fire. Subsequently in May of 2008, plaintiff, as B&G's subrogee, initiated this negligence action against Gateway and Coach to recover insurance proceeds it paid out to B&G. Issue was joined in June and July of 2008 when Gateway and Coach interposed their respective answers. Gateway and Coach filed cross-claims against each other for indemnity and contribution to recover any money they may be adjudged liable to plaintiff. In a previous motion, by a decision dated December 8, 2009, this Court granted Coach partial summary judgment dismissing plaintiff's claims against it in excess of $25,000.00, but denied the motion to the extent that Coach sought dismissal of Gateway's cross-claim.[1] Discovery is complete and Note of Issue was filed on or about January 11, 2012. The Court notes that by stipulation dated May 7, 2012, plaintiff discontinued the action as against Coach with prejudice.

In support of its motion, plaintiff claims that the action against LJG should not be barred by the statute of limitations through the application of the relation back doctrine. Up until June of 2010 plaintiff asserts it believed that Gateway was the entity engaged by Coach to stain the deck, and asserts that this belief was based upon the following: 1) paragraph 7 of Gateway's Answer wherein Gateway admits to entering into an agreement with Coach on May 24, 2007 to stain the roof deck of the building and 2) the certificate of insurance produced by Coach that it received when Coach contracted to have the deck work performed that lists Gateway as the

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[1] Coach subsequently moved to reargue, wherein reargument was granted however the Court adhered to its prior Decision and Order, dated December 8, 2009, except as to the extent of vacating two paragraphs of the decision discussing General Obligations Law § 15-108.

insured. Plaintiff states that it did not learn of LJG's identity until June of 2010 during the deposition of LJG's witness, Christopher Gueli (C. Gueli).[2]

Plaintiff also avers that it did not make this motion earlier as it was "induce[d] ... to refrain from instituting an action [against the proper defendant]" due to Gateway's "false statements or active concealment" in its answer that it was the contracting party on the date of loss, and as such defendants should be estopped from using the statute of limitations as a defense to plaintiff's motion (Notice of Motion at p. 5). Furthermore, plaintiff asserts that its delay in making the herein motion is partially because in early January of 2011, counsel for Gateway and LJG agreed to permit plaintiff to add LJG as a party defendant by stipulation, and said agreement was later withdrawn by counsel for LJG before it was executed (*id.* at 4).

In opposition, and in support of its summary judgment motion, Gateway avers that it is not a proper party to the instant lawsuit as it is wholly separate and distinct from LJG, and Gateway cannot be held vicariously liable for LJG's acts. Gateway maintains that plaintiff named the wrong contractor defendant in its complaint as it did not perform the work at issue, and that plaintiff had knowledge of LJG's existence before June of 2010, as this information was contained within their November 2008 discovery responses to Coach's First Document Request. Specifically, Gateway produced a written letter dated May 25, 2007 from Robert Gueli (R. Gueli), General Manager of both Gateway and LJG, to an insurance carrier which states that "LJG personnel had been performing work on the roof deck during the [day of the fire]" (Coach Memorandum of Law in Opposition at 4, Davis Affidavit exhibit E). Additionally, Gateway avers that no later than January 5, 2009, plaintiff was forwarded a copy of the complaint in the action that Coach instituted against Gateway and LJG in 2008, pending under

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[2] Plaintiff states that this action was consolidated with another action entitled *Coach, Inc. v Gateway Enterprises, Inc. and LJG Construction, LLC*, under the index No. 110278/2008, and pursuant to the consolidation in June of 2010 the deposition of LJG was taken. However, plaintiff does not provide a date upon which the alleged consolidation occurred, nor does plaintiff attach an Order of the Court granting consolidation. The Court notes, upon a review of the Court's case management system, that no said consolidation was recorded or noted in the abovementioned cases.

the index No. 110278/08, which also put plaintiff on notice of LJG's identity. Further, in 2009, upon stipulation of the parties Coach amended its answer to deny the allegation in the complaint that Gateway performed the rooftop work on the day of the fire, thereby putting plaintiff on notice that Gateway may not be the proper contractor defendant.

Gateway claims that the complaint is not saved by the relation back doctrine as plaintiff can only prove one of the three elements of the doctrine. Namely, plaintiff can only prove that the alleged loss arose from the same occurrence forming the basis of its claim against Gateway.

In its opposition, Coach argues that plaintiff's claim against LJG is barred by the three-year statute of limitations. Further, Coach asserts that plaintiff cannot succeed under the relation back doctrine to serve LJG after the expiration of the statute of limitations because there is no unity of interest between Gateway and LJG. Coach also avers that plaintiff's estoppel argument fails because plaintiff did not exercise the required due diligence, and the acts upon which plaintiff relies in support of its motion occurred after the statute of limitations period had expired. Coach maintains that allowing plaintiff to add LJG as this junction would cause it prejudice. Similarly, Coach states in support of its cross-motion that the discovery record establishes that LJG performed the roof work and not Gateway. Coach maintains that as Gateway cannot be liable to plaintiff in the instant case, Gateway's cross-claim against Coach for indemnification and/or contribution must be dismissed.

STANDARDS OF LAW

Amend Complaint

CPLR 3025(b) provides that "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . . Leave shall be freely given upon such terms as may be just . . ." The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from

the delay (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003], citing *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] ["Leave to amend pleadings should, of course, be freely given"]).

"As codified in New York's Civil Practice Law and Rules, what is commonly referred to as 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" (*Buran v Coupal*, 87 NY2d 173, 177 [1995]; *see Morel ex rel. Hernandez v Schenker*, 64 AD3d 403 [1st Dept 2009]; CPLR 203[b]). Under this doctrine, the three conditions a plaintiff must satisfy in order for its claims against one defendant to relate back to claims asserted against another are 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 and (3) the new party knew or should have known that, but for a mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well (*Buran*, 87 NY2d at 176, 178 [internal citation omitted]).

Summary Judgment

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving

party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Zuckerman v City of New* York, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied *(see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Plaintiff's Motion to Amend

"[A]n insurer's subrogation action is governed by the same statute of limitations applicable to the underlying personal injury or [property damage] action" (*New York Cent. Ins. Co. v Berdar Equities, Co.*, 33 Misc3d 1214[A], 2011 NY Slip Op 10157[U],*4 [Sup Ct, New York County 2011], citing *Allstate Ins. Co. v Stein*, 1 NY3d 416 [2004]; *see* CPLR 214). Accordingly, the three year statute of limitations on this action expired on May 24, 2010 as the fire which caused the loss occurred on May 24, 2007.

It is undisputed that the first prong of the relation back doctrine is met as the underlying claim against LJG arises out of the same occurrence for which a claim is asserted against Gateway. Turning to the second prong of the doctrine, unity of interest generally will be found where there is some relationship between the parties such that one party is vicariously liable for the conduct of the other (*see Mondello v New York Blood Ctr.—Greater N.Y. Blood Program*, 80 NY2d 219 [1992]; *see also Bala v Target Corp.*, 63 AD3d 518, 519 [1st Dept 2009]). Here,

the relevant inquiry is whether the interest of the 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). In other words, Gateway and LJG must "necessarily have the same defenses to the plaintiff's claim" (*Lord Day & Lord, Barrett, Smith v Broadwall Mngt. Corp.*, 301 AD2d 362, 363 [1st Dept 2003] [internal citation omitted]).

Plaintiff asserts that Gateway is united in interest with LJG as both entities do commercial construction work in New York, utilize the same computer, are insured under the same liability insurance policy as well as sharing the same telephone and fax numbers. Gateway avers however that plaintiff's allegations are insufficient as a matter of law to establish that Gateway is united in interest with LJG such that it may be held vicariously liable for the acts of LJG employees. In support of its position, Gateway cites to a secondary source on business relationships which provides factors for the Court to consider when determining whether affiliated corporations will be held liable for each other's torts (*see* Gateway's Memorandum Of Law at 4, citing 14 NY Jur 2nd, Business Relationships § 41 [2010]). These factors include: (1) an overlap in ownership, officers, directors and personnel; (2) common office space, address and telephone numbers of corporate entities; and (3) whether the corporations are treated as independent profit centers" (*id.*).

Gateway attaches to its motion papers an Affidavit of R. Gueli, which delineates the differences between the two entities (*see* Gateway Notice of Cross-Motion, exhibit J). Gateway, a corporation, is located in Forest Hills, New York and its sole stockholder is Connie Gueli (*id.* at p. 2). In contrast, LJG, an LLC, is located in Manhasset, New York and it has three partners. Justin Gueli has a 49% ownership interest in LJG, Lauren Gueli has a 49% ownership interest, and Gateway has a 2% ownership interest (*id.*). Both entities also have separate letterhead, maintain separate financial records, bank accounts, and file their own tax returns (*id.*). Furthermore, R. Gueli avers that the two entities handle different types of jobs, with Gateway

employees handling larger jobs which require union labor and LJG employees handling smaller jobs, which do not require union labor. Gateway also maintains that LJG and Gateway, at the time of the incident, maintained separate principal places of business.

Even though both entities have the same General Manager and the same telephone number, this is insufficient to establish unity of interest and does not mean that Gateway and LJG have the same defenses to plaintiff's claim. "The fact that two defendants may share resources such as office space and employees is not dispositive ... [t]hey must also share exactly the same jural relationship in the subject action" *(Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007] [internal citations omitted]; *see Valmon v 4 M&M Corp.*, 291 AD2d 343 [1st Dept 2002] [two entities having common shareholders and officers is not dispositive for purposes of unity of interest]; *Figueiredo v New Palace Painters Supply Co. Inc.*, 39 AD3d 363 [1st Dept 2007] [Court found two entities to be separate even though they share common owners and officers]; *cf. Donovan v All-Weld Products Corp.*, 34 AD3d 257 [1st Dept 2006] [entities were united in interest for purposes of the relation back doctrine where one entity is a wholly owned subsidiary of the other who acts as its distributor]).

The Court notes that the certificate of insurance that plaintiff relies upon in its motion papers does not cover the date of the fire, as the policies referenced in the certificate expired on August 5, 2006 and August 20, 2006, respectively (see Notice of Motion, exhibit C). Furthermore, based upon the foregoing, the Court finds that Gateway and LJG are not united in interest such that Gateway can not be held vicariously liable for the alleged negligence of the LJG employees, and the Court also cannot say that the interests of the two entities in the subject matter are such that they rise and fall together and that judgment against one will similarly affect the other (*see Mondello*, 80 NY2d at 226).

Finally, the documentary evidence before the Court establishes that plaintiff knew of LJG's identity and its potential liability before the expiration of the statute of limitations, and it is

clear that plaintiff's mistake in failing to name LJG as a defendant earlier is the result of lack of due diligence (*see e.g. Valmon v 4 M & M Corp.*, 291 AD2d 343 [1st Dept 2002]). Plaintiff received various documents in response to its demands shortly after instituting the instant law suit, as well as documents responsive to Coach's combined demands. Specifically, in Gateway's November 2008 discovery responses to Coach's First Document Request, a copy of which were served upon plaintiff on November 17, 2008 (*see* Affidavit of Service, Gateway Notice of Cross-Motion, exhibit G), there are numerous documents which refer to the existence of LJG, including R. Gueli's letter which states that LJG personnel had been performing work on the roof deck of the building on the date of loss[3] (*see* Davis Affidavit, exhibit E). Additionally, the discovery responses included, on LJG letterhead and signed by R. Gueli on behalf of LJG, a proposal entitled "Proposal No. 337," to a Ms. Carmen Sanchez of Coach that contains a price quote for doing "miscellaneous resealing and refurbishing work at [516 West 34th St]" (*id.* at exhibit B). "Proposal No. 337" is also attached to plaintiff's motion papers as it was provided to plaintiff by Gateway in response its combined demands (*see* exhibit H). Furthermore, by stipulation dated January 27, 2009, plaintiff stipulated to allow Coach to amend its answer in order to deny the allegation in the complaint that Gateway performed the rooftop work (*see* Davis Affidavit, exhibit 3). Plaintiff was therefore put on notice again in 2009 that Gateway may be an improper contractor defendant.

Accordingly, plaintiff's failure to name LJG earlier cannot be characterized as a mistake for purposes of the third prong of the relation back doctrine (*see Goldberg v Boatmax://, Inc.*, 41 AD3d 255 [1st Dept 2007]). Despite its receipt of discovery responses in 2008 and at the latest, subsequent to stipulating to allow Coach to amend its answer on January 27, 2009, plaintiff did not diligently attempt to amend its complaint to add LJG within the statute of limitations, even

[3] These combined demands also contain documentation such as LJG's payroll records for the work performed by LJG on plaintiff's deck.

though it was aware that Coach denied that Gateway performed the rooftop work. Since all three elements of the relation back doctrine must be met in order for plaintiff's claim to relate back to the proposed additional party (*see Buran*, 87 NY2d at 177), plaintiff's motion must be denied. It is also on the basis of lack of proper due diligence, that plaintiff's estoppel argument fails, as "plaintiff had ample time to bring its suit before the bar of the statute was effective" (*509 Sixth Ave. Corp. v New York City Transit Auth.*, 24 AD2d 975, 976 [1st Dept 1965]).

Cross-Motions for Summary Judgment

In support of its motion, Gateway claims it should be dismissed from the action as it is not a proper party to this litigation and on the basis that there are no factual issues to be decided against Gateway. Specifically, Gateway avers it did not contract to perform the work on plaintiff's roof, it did not provide the workmen to do the job, nor was it paid for the work (Gateway Notice of Cross-Motion ¶ 18). In support of these arguments Gateway points to the deposition testimony of LJG employees who performed the work at issue, who testified that on the day in question they were employees of LJG and not of Gateway (*id.* at exhibit F). Further, Gateway avers that any negligence on behalf of LJG in performing the work on plaintiff's roof cannot be imputed to Gateway, it would instead be imputed to the employer of the workmen on site on the date of loss (*id.* at 19). The Court agrees and finds that Gateway is not a proper party to this action, and as a result, plaintiff's complaint as asserted against it is dismissed.

In its prior Decision and Order, dated December 8, 2009, the Court ruled that Gateway cannot assert a claim for common-law indemnification against Coach as there is no evidence of an agreement, such as a contract or letter agreement, between the two parties. The same applies to Coach in that it cannot assert a claim for common-law indemnification against Gateway. Regarding contribution, CPLR 1401 states that "two or more persons subject to liability for damages for the same ... injury to property ... may claim contribution among them ... whether or not a judgment has been rendered against the person from whom contribution is

sought." Since there has been no showing of wrongdoing on behalf of Gateway or Coach regarding the fire on the roof deck, "the cross claims based on common-law indemnification and contribution must be dismissed" (*Linares v United Mgt. Corp.*, 16 AD3d 382, 385 [2d Dept 2005]).

CONCLUSION

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

ORDERED that plaintiff's motion seeking leave to add LJG as a party defendant is denied; and it is further,

ORDERED that Gateway's cross-motion for summary judgment dismissing plaintiff's complaint and Coach's cross-claim asserted against it is granted and Gateway is dismissed from this action and the cross-claim asserted against it by Coach is hereby dismissed; and it is further,

ORDERED that Coach's cross-motion for summary judgment dismissing Gateway's cross-claim asserted against it is granted; and it is further,

ORDERED that counsel for Gateway is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 6-29-12

Paul Wooten J.S.C.

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

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