

Grant v Solomon R. Guggenheim Museum

2013 NY Slip Op 32063(U)

September 4, 2013

Supreme Court, New York County

Docket Number: 112027/09

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 112027/2009
GRANT, JAMES
vs.
SOLOMON R. GUGGENHEIM
SEQUENCE NUMBER : 004
AMEND CAPTION/PARTIES

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

FILED

SEP 05 2013

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Dated: 9/4/13

PK, J.S.C.

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

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
JAMES GRANT,

Plaintiff,

Index No. 112027/09

-against-

DECISION/ORDER

SOLOMON R. GUGGENHEIM MUSEUM AND F.J.
SCIAME CONSTRUCTION CO. INC.,

Defendants.

-----X
F.J. SCIAME CONSTRUCTION CO. INC.,

Third-Party Plaintiff,

Index No. 591030/09

-against-

A & B MCKEON GLASS, INC.,

Third-Party Defendant.

-----X
SOLOMON R. GUGGENHEIM MUSEUM,

Second Third-Party Plaintiff

Index No. 90178/10

-against-

A & B MCKEON GLASS, INC.,

Second Third-Party Defendant

-----X
SOLOMON R. GUGGENHEIM MUSEUM and F.J.
SCIAME CONSTRUCTION CO. INC.,

Third Third-Party Plaintiffs,

Index No. 590948/10

-against-

BAY CRANE SERVICE, INC.,

FILED

SEP 05 2013

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NYS SUPREME COURT-CIVIL

FILED
MAY 10 2011
COURT OF APPEALS
IN THE STATE OF TEXAS

RECEIVED
MAY 10 2011
125 SUPREME COURT CIVIL
125 SUPREME COURT CIVIL

Third Third-Party Defendant.

-----X
SOLOMON R. GUGGENHEIM MUSEUM and F.J.
SCIAME CONSTRUCTION CO. INC.,

Fourth Third-Party Plaintiffs,

Index No. 590372/11

-against-

ROEHL TRANSPORTATION INC.,

Fourth Third-Party Defendant.

-----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>
Affirmations in Opposition.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff James Grant commenced the instant action to recover for injuries he allegedly sustained as a result of window renovations being performed at the Guggenheim Museum (the “Museum”) in New York City on May 23, 2008. Plaintiff now moves for an order granting him leave to amend his complaint to add third-party defendant ROEHL Transportation Inc. (“ROEHL”) as a direct first-party defendant although his time to do so has expired. For the reasons set forth below, plaintiff’s motion is granted.

The relevant facts are as follows. In or around May 2008, the Museum was renovating its windows which included the hoisting of heavy crates of glass replacement windows from a delivery truck up onto the Museum’s balconies. Petitioner was a local union 580 ornamental

ironworker who was employed by third-party defendant A & B McKeon Glass, Inc. (“A & B”). On or about May 23, 2008, plaintiff was unloading the glass crates when he was allegedly struck by an unsecured 5,000-pound crate from approximately four feet above, sustaining severe injuries.

In or around September 2009, plaintiff commenced the instant action against defendants the Museum and F.J. Sciame Construction Co. Inc. (“Sciame”), the general contractor, alleging causes of action for negligence and violations of Sections 200, 240(1) and 241(6) of the Labor Law and certain sections of the Industrial Code. In late 2009, the Museum and Sciame individually commenced third-party actions against A & B, which interposed an answer in January 2010. In October 2010, the Museum and Sciame commenced another third-party action against Bay Crane Service, Inc. (“Bay Crane”), which interposed an answer in February 2011. In or around April 2011, the Museum and Sciame commenced another third-party action against ROEHL, the trucking company hired by A & B to transport the crates.

Discovery proceeded and the depositions of plaintiff, the Museum, Sciame, A & B and Bay Crane were conducted. Plaintiff alleges that during a June 23, 2011 non-party deposition of Craig Celmer, a former employee of A & B, plaintiff obtained a video surveillance recording establishing that ROEHL’s actions were a direct causative factor of the accident. Plaintiff alleges that the “video clearly identifies the ROEHL truck driver, Kirk Asbury, carelessly and recklessly pulling down on the J-bar held by Plaintiff which caused the 5000 pound crate of glass to strike Plaintiff, knocking him from the trailer and down an additional four feet underneath the trailer.” Plaintiff now seeks to amend his complaint to add ROEHL as a direct first-party defendant although his time to do so has expired.

Pursuant to CPLR § 203(f),

A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

In *Duffy v. Horton Memorial Hospital*, 66 N.Y.2d 473 (1985), the Court of Appeals addressed the issue of whether CPLR § 203(f) applies to claims against a third-party defendant against whom the statute of limitations has already run. In holding that it does, the Court of Appeals stated:

It is evident that when a third party has been served with the third-party complaint, and all prior pleadings in the action, as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time. The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose. Consequently, an amendment of the complaint may be permitted, in the court's discretion, and 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...

[W]here, 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. In such cases, there is room for the exercise of a sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment.

(Internal citations omitted). Thus, the plaintiff must show that the potential direct first-party defendant had adequate notice of plaintiff's claims at the time the third-party complaint was served and that it will not be prejudiced by the delay as the potential direct defendant may be "no worse off than [it] would have been if plaintiff[] had exercised [its] right under CPLR 1009 to

amend [its] complaint within 20 days after service of the third-party complaint to assert a direct claim against the third-party defendant[.]” *Holst v. Edinger*, 93 A.D.2d 313, 316 (1st Dept 1983).

In the instant action, plaintiff’s motion for an order granting him leave to amend his complaint to add ROEHL as a direct first-party defendant is granted. Although plaintiff’s time to commence an action against ROEHL expired in May 2011, ROEHL was brought in as a third-party defendant by Sciame and the Museum one month earlier, in April 2011, when it was also served with the underlying complaint. Therefore, ROEHL may be added as a direct defendant as it had actual notice of plaintiff’s potential claims at that time. *See Duffy*, 66 N.Y.2d 473.

Additionally, ROEHL will not be prejudiced by the delay as it will be no worse off than it would have been if plaintiff exercised his right to amend the complaint immediately after an action was commenced against ROEHL. Although the court notes that plaintiff waited two years to add ROEHL as a direct defendant since obtaining the video recording, such delay is not prejudicial as ROEHL has participated in all discovery, including depositions of plaintiff, Sciame, the Museum, A & B and Bay Crane. Additionally, ROEHL’s assertion that it has been prejudiced because it would have adopted a strategy to directly defend against any claims had an action by plaintiff been timely commenced against it is without merit. The fact that ROEHL may have adopted a different strategy is insufficient to establish prejudice. The amendment of the complaint merely seeks to add a new theory of recovery or defense arising out of a transaction or occurrence already in litigation. “A party is likely to have collected and preserved available evidence relating to the entire transaction or occurrence and the defendant’s sense of security has already been disturbed in the pending action....” *Duffy*, 66 N.Y.2d at 477. However, to the extent ROEHL seeks additional discovery to aid in its defense of plaintiff’s claims, the Court will

address such request at a Compliance Conference with all parties present.

ROEHL's assertion that plaintiff cannot get the benefit of the "relation back doctrine" on the grounds that ROEHL and the other first-party defendants are not united in interest and are adverse parties is without merit. Whether the parties are united in interest or adverse is immaterial as the issue before this court is only whether plaintiff's direct claim against a third-party defendant relates back to the date of service of the third-party complaint for statute of limitations purposes. It is well-settled that such a claim will relate back if the third-party complaint and the amended complaint plaintiff seeks to serve arise from the same transaction or occurrence. *See Duffy*, 66 N.Y.2d 473. Here, plaintiff's claims against defendants and third-party defendant ROEHL arise out of his accident that occurred at the Museum on May 23, 2008 and thus they relate back to the date of service of the third-party complaint against ROEHL.

Accordingly, plaintiff's motion for an order granting him leave to amend his complaint to add ROEHL as a direct first-party defendant is granted. The Clerk is directed to amend the caption accordingly. The parties are to appear for a Compliance Conference on October 1, 2013 at 60 Centre Street, Room 432 at 11:00 a.m. to address any outstanding discovery. This constitutes the decision and order of the court.

Dated: 9/4/13

FILED
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