

Montalvo v Greenlawn CVS, Inc.

2013 NY Slip Op 32948(U)

October 25, 2013

Supreme Court, Suffolk County

Docket Number: 10996/2012

Judge: Ralph T. Gazzillo

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action against it on the grounds that it was commenced outside the applicable Statute of Limitations. Specifically, defendant argues that since this is an action for personal injury which took place on August 13, 2003, plaintiff's having commenced the action pursuant to Labor Law §§ 240 and 241(6) and NYCRR 23-1.7 and 1.16, was outside the statute of limitations which is 3 years. Therefore, plaintiff argues, that the statute of limitations expired on August 13, 2006, three years after the August 13, 2003 accident occurred. Defendant submits a copy of the summons and complaint to establish that the alleged accident occurred on August 13, 2003.

In opposition to the motion, plaintiffs argue that the defendant CVS Greenlawn (hereinafter Greenlawn) is "united in interest" with CVS Pharmacy, Inc., (hereinafter Pharmacy), such that plaintiffs' claim should "relate back" to the plaintiffs' claim against CVS Pharmacy, Inc. Accordingly plaintiff argues, defendant's Statute of Limitations must fail.

Plaintiff's "unity of interest" claim rises and falls on the relationship between the two entities, Greenlawn CVS and CVS Pharmacy, Inc. Specifically, in order for the claims against defendant Greenlawn CVS to "relate back" to the claims asserted against CVS Pharmacy, Inc., they must arise out of the same conduct, transaction or occurrence and the new party must be united in interest with the old party such that the new party can be charged with notice of the institution of the action and would not be prejudiced in defending the action on the merits. In other words, when there is unity of interest, 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." (see, *Buran v. Coupal*, 87 NY2d 173, 173).

In support of its position that CVS Pharmacy has unity of interest with Greenlawn, plaintiff argues that, with regard to the construction project wherein plaintiff was injured, Pharmacy is actually the agent of property owner CVS Greenlawn. In connection with this assertion, plaintiff submits copies of two agreements between Greenlawn and Pharmacy. The first agreement is actually entitled "Agency Agreement". In that agreement, Greenlawn "... appoints Pharmacy to act as its (i) general agent and (ii) provider of general and administrative services, field support, and business advisory services..." Paragraph 3 of the agency agreement states that Pharmacy "shall provide field support services to the Company. This includes but is not limited to, store support and training, set-up and construction services, building maintenance and real estate management, and loss prevention". The agreement further provides that Pharmacy and Greenlawn would indemnify, defend and hold one another harmless in the event of losses occasioned by the other. It is important to note that the agency agreement was executed by Melanie K. Luker on behalf of Greenlawn, CVS. The second agreement provided by plaintiff is entitled "CVS Construction Agreement for Greenlawn CVS, Inc.", however, the agreement is between CVS Pharmacy, Inc. and Jato Building Contractors, Inc and sets forth the terms and conditions under which Jato Building Contractors, Inc. would construct a building for CVS Pharmacy, Inc., on the property owned by Greenlawn CVS, Inc. Despite the fact that it owns the subject property, Greenlawn CVS, Inc is not a party to the construction agreement.

In addition to submitting these contractual documents to support its claim that CVS Pharmacy is the agent of the defendant, and that therefore they two companies have unity of interest, plaintiff submits an excerpt from an appellate brief submitted by defendant in a prior action involving the same defendants; i.e. Pharmacy, Greenlawn and Jato¹. In that brief, in response to respondent Jato's brief, wherein Jato argued that Greenlawn was not in privity with Jato under the construction agreement, appellants Pharmacy and Greenlawn argued that Greenlawn is a subsidiary of Pharmacy and the construction agreement was made "by and between CVS Pharmacy, Inc. and its affiliates and subsidiaries." Accordingly, plaintiff argues that Greenlawn and Pharmacy are treated like one company and therefore share a unity of interest. In addition, the motion papers include copies of the transcripts of the depositions of various CVS Pharmacy employees.

Defendant counters that the fact that Pharmacy does not own an interest in the premises precludes Pharmacy and Greenlawn from having unity of interest since, in order to have a unity of interest it plaintiff must show that "the owner had delegated to [that party] the authority to supervise and control plaintiff's work".

The law in New York regarding "unity of interest" was discussed at length in *Walls v. Turner Construction Co.*, 4 NY3d 861. In that case, the Court of Appeals held that a construction manager that, pursuant to an agreement, could stop construction if something improper was being done on the job site, was the agent of the owner. The Court made this ruling in spite of the general rule that a construction manager of a work site is generally not responsible for injuries under Labor Law §240 (1). In its decision, the Court of Appeals cited *Russin v. Picciano & Son*, 54 NY2d 311 which held that "[w]hen the work giving rise to [the duty to conform to the requirements of section 240(1)] has been delegated to a third party, that third party then obtains the concomitant authority to supervise and control that work and becomes a statutory "agent" of the owner or general contractor." (*Russin at 318*). Where there is unity of interest between parties, "notice of the defendant within the applicable limitations" period allows the claim to relate back to the owners. In other words, if but for a mistake made by the plaintiff, defendant "knew or should have known" that an action would have been brought against him, the claim will relate back and the statute of limitations inapplicable (see, *Buran v. Coupal*, 87 NY 2d 173 and *Thomsen v. Suffolk County Police Department*, 50 AD3d 1015).

In the matter at bar, a reading of the case law and relevant documents submitted on the motion show that Pharmacy and Greenlawn had unity of interest with regard to the plaintiff's claim. The agency agreement and construction agreements executed by Pharmacy and Greenlawn herein show that Greenlawn relinquished all authority to Pharmacy for the purpose of constructing the CVS pharmacy building on the property owned by Greenlawn. Pharmacy hired the general contractor, paid for the construction and provided all construction services and real estate management, including the right to reject subcontractors. Pharmacy's employees visited the site during

¹It is not insignificant that Pharmacy and Greenlawn were represented by the same counsel in that action.

construction and made inspections thereof. Those employees further indicated that they had the ability to shut the job down if they found safety hazards when they inspected. Greenlawn had little, if anything, to do with the construction of the CVS pharmacy building on its property. Greenlawn did not manage, control, pay or approve or disapprove the construction of the building on its site. All of that responsibility was relegated to Pharmacy. A reading of the deposition transcripts and attached agreements show that there was no retention of control for construction services or real estate management by Greenlawn. Rather, Pharmacy was in complete control of all aspects of building construction. The lack of a distinct delineation between CVS Pharmacy also is evidenced by the fact that an individual, i.e., Melanie Luker, has signed various contracts as an officer of CVS Pharmacy as well as for CVS Greenlawn (as well as other related CVS entities). Furthermore, Pharmacy's employees cannot adequately distinguish one CVS entity from another, i.e. one of them was not even sure of the exact name of the entity by whom he was employed. Additionally, following the incident wherein plaintiff was injured, CVS Pharmacy assigned a claims adjuster to handle the claim "on behalf of our store Greenlawn CVS". Lastly, Greenlawn and Pharmacy share the same corporate address for service of process as well as the same counsel. Counsel in the Pharmacy action conducted extensive discovery. Accordingly, it is clear that Greenlawn had actual notice of the plaintiff's claim and there would be no prejudice to the Greenlawn if the action were permitted to go forward.

The unity of interest between CVS Greenlawn and CVS Pharmacy pursuant to Labor Law 240, et seq and precludes dismissal of the instant action based upon the applicable statute of limitations and as such, defendant's motion is denied.

Dated: 10/25/13
 Riverhead, NY



 Ralph T. Gazzillo
 A.J.S.C.

NON-FINAL DISPOSITION

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