

Parouse v A.P. Moller-Maersk, Inc.

2014 NY Slip Op 30597(U)

March 6, 2014

Supreme Court, New York County

Docket Number: 190105/11

Judge: Sherry Klein Heitler

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190105/2011

SULLIVAN, CHARLES

vs.

A.P. MOLLER-MAERSK

SEQUENCE NUMBER : 004

AMEND SUPPLEMENT PLEADINGS

(WARREN PUMPS)

INDEX NO. 190105/11

MOTION DATE _____

MOTION SEQ. NO. 004

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
memorandum decision dated 3.5.14.

FILED

MAR 13 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3.6.14

[Signature], J.S.C.
HON. SHERRY KLEIN HEITLER

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. 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 30

-----X
DAVID PAROUSE, as Special Administrator of the
Estate of CHARLES SULLIVAN, deceased,

Index No. 190105/11
Motion Seq. 004

Plaintiff,
-against-

DECISION & ORDER

A.P. MOLLER-MAERSK, INC., et al.,

FILED

Defendants.

15 2014

-----X
SHERRY KLEIN HEITLER, J:

NEW YORK
COUNTY CLERK'S OFFICE

In this asbestos personal injury action, David Parouse, as Special Administrator of the Estate of Charles Sullivan ("Plaintiff"), moves pursuant to CPLR 3025(b)¹ for leave to amend the complaint herein to add Carrier Corporation ("Carrier"), Eaton Corporation ("Eaton"), FMC Corporation ("FMC"), Warren Pumps, LLC ("Warren"), and York International Corporation ("York") (collectively, "Defendants") as defendants to this action and to deem its second supplemental summons and second verified complaint ("Second Amended Complaint") timely served on all parties. The motion is opposed by Eaton, FMC, and Warren on the ground, among others, that the Statute of Limitations in respect of Plaintiff's claims against them has expired.

On March 17, 2011 Plaintiff's decedent Charles Sullivan filed a summons and verified complaint against thirty-five defendants by which he sought damages for personal injuries allegedly caused by his occupational exposure to asbestos and asbestos-containing products.

¹ Pursuant to CPLR 3025(b), a party "may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Mr. Sullivan died on April 4, 2011.² Following the appointment of Plaintiff as Special Administrator of Mr. Sullivan's estate, the complaint was amended on February 12, 2012 to add a wrongful death cause of action. Plaintiff submits, and this court's records confirm, that on April 2, 2013 Plaintiff filed an order to show cause with this court's *ex-parte* clerk by which he sought leave to further amend the complaint to add Carrier, Eaton, FMC, Warren, and York as defendants. Plaintiff's filing included pleadings in the form annexed as the Second Amended Complaint. Notwithstanding that Plaintiff failed to transmit such order to show cause to this court for signature (causing it to be marked off by the clerk on May 20, 2013), Plaintiff asserts that he nonetheless caused copies of the Second Amended Complaint to be timely served on Eaton, FMC, and York on April 2, 2013 and on Carrier and Warren on April 3, 2013.³ The fact of such service is not in dispute.

Plaintiff again moves, now by notice of motion, to add the Defendants to this action in the form of the Second Amended Complaint. Eaton, FMC, and Warren argue that Plaintiff is barred from doing so because Plaintiff's first order to show cause was never officially "filed" with the court and Plaintiff's second attempt to bring such claims against them is time barred.⁴

In 1999 the Court of Appeals held that the filing of a motion for leave to amend a complaint to add a party defendant to an action which includes the proposed pleadings, will, for Statute of Limitations purposes, be considered timely against such defendant. *See Perez v Paramount Communs.*, 92 NY2d 749, 754 (1999) ("[w]here the motion, including the proposed supplemental summons and amended complaint, is filed with the court within the applicable limitations period, but the ruling by

² Pursuant to EPTL § 5-4.1, the Statute of Limitations periods for Mr. Sullivan's personal injury and wrongful death claims were tolled for two years to April 4, 2013.

³ Defendant York served an answer to the Second Amended Complaint on or about May 13, 2013 which includes a Statute of Limitations affirmative defense. On July 19, 2013 all of the Defendants except Warren attended the deposition of one of Mr. Sullivan's former co-workers.

⁴ Defendants Carrier and York have not opposed this motion, and as to them Plaintiff's motion is granted.

the court does not occur until after expiration, dismissal is inappropriate”) In 2007, CPLR 2001⁵ was specifically amended to correct for those cases which had previously held that defects in the commencement of an action, including the failure to purchase an index number or mistake in the filing process, necessarily resulted in dismissal⁶, and to clarify that courts may waive non-prejudicial defects that may occur in the commencement of an action. *See Ruffin v Lion Corp.*, 15 NY3d 578, 581 (2010) (“the purpose of the 2007 amendment to CPLR 2001 was to allow courts to correct or disregard technical defects, occurring at the commencement of an action, that do not prejudice the opposing party.”)

To determine whether the defect in Plaintiff’s initial filing is merely technical and thus falls within the scope of CPLR 2001, this court “must be guided by the principle of notice to the defendant--notice that must be ‘reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections’. . . .” *Ruffin, supra*, at 582-83 (quoting *Raschel v Rish*, 69 NY2d 694, 696 [1986]). The “key question is whether, if the correction of the mistake is permitted, or the mistake is disregarded, a substantial right of the defendant or respondent would be prejudiced.” *MacLeod v County of Nassau*, 75 AD3d 57, 63 (2d Dept 2010).

In this case, there can be no serious dispute that Plaintiff did file its order to show cause and the Second Amended Complaint with the *ex-parte* clerk of this court and that Plaintiff effected service of the Second Amended Complaint on each Defendant prior to the expiration of the Statute of

⁵ CPLR 2001, entitled “Mistakes, omissions, defects and irregularities”, provides: “At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, provided that any applicable fees shall be paid.”

⁶ *E.g., In re Fry v Village of Tarrytown*, 89 NY2d 714 (1997); *In re Gershel v Porr*, 89 NY2d 327 (1996).

Limitations. That the Plaintiff failed to follow through on such filing may be considered a technical error, which the court may overlook under CPLR 2001. Further militating against a claim of prejudice is the fact that the Defendants were notified of and most took the opportunity to attend depositions in this proceeding. In sum, the Defendants were timely placed on notice of Plaintiff's personal injury and wrongful death claims against them, and any claim the Defendants may wish to raise that they were prejudiced by Plaintiff's technical error is without merit.

In addition, this action is governed by the NYCAL Case Management Order, section VI(E) of which permits a plaintiff to amend his/her complaint without leave of the court at any time prior to the expiration of the applicable Statute of Limitations:

Any plaintiff may, without further leave of the Court, amend his or her complaint: to add claims based on survivorship, death of the original plaintiff, change of the disease alleged, loss of consortium or society; to sever any joined claims; or to add additional defendants. Service of such amendments on counsel who have appeared in the action for a defendant shall be considered service on that defendant. . . .

In other words, it would have been sufficient had Plaintiff filed the Second Amended Complaint with the Clerk of the court and served copies thereof on all parties.

In light of the foregoing, it is hereby

ORDERED that Plaintiff's motion for leave to amend in the form annexed to the Second Amended Complaint is granted. Plaintiff shall serve copies of the Second Amended Complaint and a copy of this decision and order on all interested parties within 20 days from the date hereof, as to which all parties shall have the right to respond within 20 days of service thereof.

This constitutes the decision and order of the court.

FILED

MAR 13 2014

NEW YORK COUNTY CLERKS OFFICE

DATED: 3-6-14

SHERRY KLEIN HEITLER, J.S.C