

**Rios v Metropolitan Museum of Art**

2014 NY Slip Op 30771(U)

March 24, 2014

Supreme Court, New York County

Docket Number: 100795/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

KENNETH RIOS and MICHELE RIOS,

INDEX NO. 100795/11

Plaintiffs,

MOTION SEQ. NO. 002

- against -

THE METROPOLITAN MUSEUM OF ART,

Defendant.

THE METROPOLITAN MUSEUM OF ART,

THIRD PARTY INDEX NO. 590132/12

Third-Party Plaintiff,

- against -

RESTAURANT ASSOCIATES, INC.,

MAR 31 2014

Third-Party Defendant

**FILED**

NEW YORK

COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 3, were read on this motion by plaintiff for leave to add Restaurant Associates as a direct defendant.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo) _____	<u>2</u>
Replying Affidavits (Reply Memo) _____	<u>3</u>

Cross-Motion:  Yes  No

Before the Court is Kenneth Rios and Michele Rios' (plaintiffs) motion, pursuant to CPLR 3025(b) and 1003, seeking leave to add third-party defendant Restaurant Associates, Inc. (Restaurant) as a direct defendant and to serve a supplemental Summons and Amended Complaint. Restaurant is in opposition to the plaintiffs' motion.

BACKGROUND

This is a negligence action brought by plaintiffs to recover for damages sustained by Kenneth Rios (Mr. Rios) on August 6, 2008 when he became injured while making a delivery at

the Metropolitan Museum of Art (MET) which involved the use of a hydraulic lift to assist with the off-loading of merchandise onto the MET's loading dock. Plaintiffs commenced the herein action against the MET on or about January 20, 2011, and issue was joined on or about February 2, 2011 when the MET interposed its answer. On or about February 21, 2012 the MET instituted a third-party action against Restaurant asserting claims for common law indemnity, contribution, contractual indemnification and breach of contract. Issue was joined in the third-party action when Restaurant interposed its answer on or about March 30, 2012. Discovery in this matter is complete and plaintiffs filed the Note of Issue (NOI) and Certificate of Readiness on March 20, 2013.

In support of their motion, plaintiffs claim that their motion to amend adding Restaurant as a direct defendant should be granted as the proposed amendment has merit and poses no prejudice or surprise to Restaurant.

In opposition, Restaurant maintains that plaintiffs' motion must be denied as the statute of limitations has tolled and plaintiffs' delay in seeking leave to amend has caused it undue prejudice. Restaurant avers that it is wholly separate and distinct from the MET, and Restaurant cannot be held vicariously liable for the MET's acts. Pursuant to a contract between the MET and Restaurant, Restaurant was responsible for cleaning the top of the lift, and the MET repaired and maintained the lift. Restaurant claims that the complaint is not saved by the relation back doctrine as plaintiffs can only prove one of the three elements of the doctrine. Namely, plaintiffs can only prove that the alleged loss arose from the same occurrence forming the basis of its claim against the MET. Furthermore, Restaurant asserts that there is no unity of interest between Restaurant and the MET as they are adversaries in this litigation.

STANDARD

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]).

#### DISCUSSION

Negligence actions have a three year statute of limitations (see CPLR 214). Accordingly, the three year statute of limitations on this action expired on August 6, 2011 as the accident which caused Mr. Rios’ injuries occurred on August 6, 2008.

The Court notes that in their motion papers plaintiffs do not discuss or mention the relation back doctrine, nor do they make any arguments that the claim that they seek to assert against Restaurant relates back to the claim brought against the MET. It is in their reply that

[\* 4]

plaintiffs mention the relation back doctrine for the first time. However, a party cannot make out its prima facie case in reply, and as such arguments raised for the first time in reply papers are not considered (see *Wal-Mart Stores, Inc. v U.S. Fid. & Guar. Co.*, 11 AD3d 300, 301 [1st Dept 2004]; *Schultz v 400 Co-op Corp.*, 292 AD2d 16, 21 [1st Dept 2002], quoting *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 [1st Dept 1993] [the purpose of “reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” ]).

Furthermore, in their motion papers plaintiffs do not proffer an excuse for the delay in seeking to amend the caption to add Restaurant as a direct defendant more than one year after the NOI was filed and more than two years after the applicable statute of limitations had expired.

Although the first prong of the relation back doctrine is met as the underlying claim against Restaurant arises out of the same occurrence for which a claim is asserted against the MET, plaintiff has failed to establish the second and third prongs 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, the MET and Restaurant 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]), which they do not. Furthermore, plaintiffs were aware of Restaurant’s identity as early as February 2012 when the MET instituted a third-party action against it. Accordingly, plaintiffs’ failure to name Restaurant 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]). As such, plaintiffs' motion to amend is denied.

CONCLUSION


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

ORDERED that plaintiffs' motion, pursuant to CPLR 3025(b) and 1003, seeking leave to add third-party defendant Restaurant Associates, Inc. as a direct defendant and to serve a supplemental Summons and Amended Complaint is denied; and it is further,

ORDERED that counsel for Restaurant Associates, Inc. is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 3-24-14

  
PAUL WOOTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**FILED**  
MAR 31 2014  
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