

Rosenhaus v 211 E. 46th Owners LLC

2014 NY Slip Op 30904(U)

April 8, 2014

Supreme Court, New York County

Docket Number: 116263/08

Judge: Barbara Jaffe

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
COUNTY OF NEW YORK : IAS PART 12

-----X

STEVEN ROSENHAUS, *et al.*,

Index No. 116263/08

Plaintiffs,

Mot. seq. no.: 016

- against -

DECISION AND ORDER

211 EAST 46th OWNERS LLC, *et al.*,

Defendants.

-----X

BARBARA JAFFE, J.:

For plaintiff:

Martin H. Weisfuse, Esq.
Weisfuse & Weisfuse, LLP
420 Lexington Ave., Ste. 2328
New York, NY 10170-5639
212-983-3000

For sponsor:

Arthur P. Xanthos, Esq.
Gartner & Bloom, PC
801 Second Ave., 15th fl.
New York, NY 10017
212-759-5800

For Goodstein & L'Ecole:

Carolyn R. Davis, Esq.
Stanley Goos, Esq.
Harris Beach PLLC
100 Wall St., 23rd fl.
New York, NY 10005
212-687-0100

Plaintiff Steven Rosenhaus moves pursuant to CPLR 3025(b) for an order granting him leave to amend his summons and complaint, and for an order compelling defendant Extell Development Company, LLC, to provide information pertaining to one of its former employees. Defendants 211 East 46th Owners LLC (LLC), Extell, and Cammeby's Management Company, LLC (collectively, sponsor), Goodstein Management Inc. n/k/a Goodstein Management, LLC, and 211 East 46th Street Corp. f/k/a Goodstein Management, LLC, and proposed defendant L'Ecole Condominium oppose.

I. MOTION TO AMEND

A. Background and contentions

Plaintiff alleges that between 2007 and 2008, he was exposed to toxic dust that seeped into his apartment at 211 East 46th Street in Manhattan as a result of renovations conducted in connection with the condominium conversion. He commenced an action in 2008 against

sponsor, Goodstein, who is the premises' managing agent, and various contractors and subcontractors. In the proposed summons and complaint, plaintiff seeks to add L'Ecole as a defendant. (NYSCEF 263). He contends that his lease and other documents reflected that LLC owned the premises (NYSCEF 262), and that he first learned at the deposition of Goodstein's witness that L'Ecole had assumed ownership of the premises in 2008. His mistake was reasonable, he contends, given the complex real estate transactions leading to the conversion. And, as Goodstein was L'Ecole's managing agent, and as both parties share counsel and an insurance carrier, L'Ecole had timely notice of the suit and is not prejudiced. He also asserts that as L'Ecole's liability is based on its ownership of the premises and is not charged with active negligence, the need for further discovery is unnecessary. (NYSCEF 259, 285).

Defendants maintain that plaintiff's proposed claim, commenced more than three years after discovery of the alleged exposure, is time-barred and that, in any event, plaintiff is a longtime tenant of the building whose deposition testimony and other documents produced during discovery reference the L'Ecole condominium board. They also observe that ownership of New York City premises is readily available to the public online. Thus, defendants contend, plaintiff cannot claim ignorance of L'Ecole's ownership, and argue that L'Ecole's knowledge of plaintiff's claims is irrelevant given its reasonable belief that he deliberately chose not to sue it. Defendants also claim that plaintiff submits no proof that the amendment is meritorious. (NYSCEF 271, 272).

B. Analysis

Leave to amend pleadings pursuant to 3025(b) shall be freely granted, unless the proposed amendment plainly lacks merit or surprises or prejudices the opponent. (*MBIA Ins.*

Corp. v Greystone & Co., Inc., 74 AD3d 499 [1st Dept 2010]). The motion must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment. (*Zaid Theatre Corp. v Sona Realty Co.*, 18 AD3d 352 [1st Dept 2005]). Verified pleadings may suffice as proof of merit. (*See* CPLR 105[u]). Here, plaintiff verified the proposed amendment.

Pursuant to CPLR 203(b), a party may assert an otherwise time-barred claim when it relates back to one previously and timely asserted against another defendant. The party seeking to relate a claim back in time and thereby avoid a time-bar must show that 1) both claims arise from the same conduct, transaction, or occurrence; 2) the proposed defendant is united in interest with the original defendant, and by reason of that relationship may be charged with notice of the action so that it will not be prejudiced in defending the suit on the merits; and 3) the proposed defendant knew or should have known it would have also been sued, but for the mistake by plaintiff as to its identity. (*Buran v Coupal*, 87 NY2d 173, 178 [1995]).

Although the mistake need not be excusable, a claim will not relate back if the offering party engaged in bad faith and intentionally eschewed suing the proposed party in order to secure a tactical advantage in the litigation. (*Id.* at 181).

Here, plaintiff's claims against L'Ecole arise from the same alleged incident, and L'Ecole, Goodstein's principal, is united in its interest with Goodstein as the two share counsel and an insurance carrier. (*See Morel ex rel. Hernandez v Schenker*, 64 AD3d 403, 404 [1st Dept 2009] [defendants insured under same policy, leave to amend granted]). Thus, L'Ecole is properly charged with notice of plaintiff's claim.

As owners of multiple dwellings have a nondelegable duty to maintain premises in a

reasonably safe condition (*see, e.g., Mas v Two Bridges Assoc. by Nat. Kinney Corp.*, 75 NY2d 680, 687 [1990]), and as plaintiff sued LLC, sponsor, Goodstein, and the contractors allegedly involved in the renovation, L'Ecole could not have reasonably concluded that he had determined that there was no meritorious claim against it, but should have known that, but for his misidentification of LLC as the premises' owner, he would have sued it as well. Consequently, and in the absence of any evidence of bad faith on plaintiff's part, his mistake and confusion in failing to realize that L'Ecole was the owner is of no legal consequence.

The circumstances underlying the court's decision in *Bryant v South Nassau Communities Hosp.*, 59 AD3d 655 (2d Dept 2009), are distinguishable.

II. MOTION TO COMPEL DISCOVERY

Plaintiff alleges that a former Extell employee inspected his apartment after he complained to his superintendent about the dust infiltration and concluded that it resulted from the defective installation of a window. Extell's witness testified that when he last spoke with the employee, she was living in Israel. (NYSCEF 288, 292). Plaintiff claims that the employee is uniquely able to testify to the alleged cause of the dust infiltration and that letters sent to her last known Manhattan address were returned unopened. He thus seeks disclosure of her date of birth and last current address. According to plaintiff's counsel, sponsor refuses to disclose this information absent a court order. (NYSCEF 259).

Sponsor contends that plaintiff has established no genuine need for the information, and observes that he fails to submit a separate affirmation of good faith or the discovery demand he wishes to enforce. (NYSCEF 271). In reply, plaintiff submits an affirmation of good faith. (NYSCEF 286). At oral argument, sponsor reiterated its refusal to disclose the information

voluntarily due to the risk of identity theft. (NYSCEF 344).

The failure to include an affirmation of good faith to compel discovery pursuant to 22 NYCRR 202.7 is excusable when the effort to resolve the dispute non-judicially would be futile. (*Carrasquillo ex rel. Rivera v Netsloh Realty Corp.*, 279 AD2d 334 [1st Dept 2001]). As plaintiff's counsel stated in his initial affirmation, sponsor refused to resolve this dispute. In any event, counsel has submitted an affirmation of good faith in reply, and sponsor acknowledges its refusal.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff Steven Rosenhaus's motion for leave to amend his pleadings is granted; it is further

ORDERED, that the amended summons and verified complaint in the proposed form annexed to the moving papers and e-filed at NYSCEF Doc. No. 263 be deemed served upon defendants with service of a copy of this order with notice of entry thereof; it is further

ORDERED, that plaintiff serve the amended summons and verified complaint in the proposed form annexed to the moving papers and e-filed at NYSCEF Doc. No. 263 upon proposed defendant L'Ecole Condominium in accordance with the Civil Practice Law and Rules within 30 days after service of a copy of this order with notice of entry; it is further

ORDERED, that the caption be amended accordingly; it is further

ORDERED, that plaintiff serve a copy of this order with notice of entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the amended caption; it is further

ORDERED, that defendant Extell Development Company, LLC provide plaintiff, within 30 days of the date of this order, the date of birth and last known international address of Dana Eisner; and it is further

ORDERED, that the information not be disclosed to anyone except the parties to this action and their attorneys.

ENTER:



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 8, 2014
New York, New York