

<b>Holt v Staples of the Off. Superstore E., Inc.</b>
2014 NY Slip Op 31246(U)
May 12, 2014
Sup Ct, New York County
Docket Number: 152013/12
Judge: Ellen M. Coin
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 63

-----X  
GEORGE HOLT and GEORGIA HOLT,

Plaintiffs,

-against-

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STAPLES THE OFFICE SUPERSTORE EAST,  
INC., STAPLES THE OFFICE SUPERSTORE,  
LLC, STAPLES, INC., CPGP CORPORATION,  
and CPEOA, LIMITED PARTNERSHIP,

Defendants.

-----X  
STAPLES THE OFFICE SUPERSTORE EAST,  
INC., STAPLES THE OFFICE SUPERSTORE,  
LLC, STAPLES, INC., CPGP CORPORATION,  
and CPEOA, LIMITED PARTNERSHIP,

Third-Party Plaintiffs

-against-

WALDBAUM-COLLEGE POINT CENTER, INC.,  
THE GREAT ATLANTIC & PACIFIC TEA  
COMPANY, INC., APW SUPERMARKETS, INC.,  
WALDBAUM, INC., COLLEGE POINT  
GROCERY OWNERS, LLC , 1907 VENTURES,  
LLC, 1411 VENTURES LLC, and AAG  
MANAGEMENT, INC.,

Third-Party Defendants.

-----X  
**ELLEN M. COIN. J.:**

Plaintiffs George Holt and Georgia Holt move, pursuant to CPLR 3025 (b), for leave to amend their complaint and serve a supplementary summons, so as to bring a direct cause of

action against third-party defendants College Point Grocery Owners, LLC, 1907 Ventures, LLC, 1411 Ventures, LLC, and AAG Management, Inc.

This action arises from the fall and injury of George Holt on October 2, 2010, in the parking lot adjacent to the Staples store located at 134-01 20<sup>th</sup> Avenue in Queens County. Plaintiffs allege that the surface of the parking lot was negligently allowed to subside, relative to the sidewalk, and that the sidewalk was in poor repair.

Plaintiffs commenced the action on April 20, 2012. On or about November 6, 2012, well before the expiration of the three-year statute of limitations governing negligence claims (CPLR 214 [5]), defendants commenced the third-party action. Plaintiffs' motion, made on January 24, 2014, is plainly untimely, unless it is held to relate back, pursuant to CPLR 203 (f).

CPLR 203 (f) provides that

"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."

CPLR 203 (f) does not explicitly govern an amendment that seeks to add a new defendant. In *Mondello v New York Blood Ctr. -- Greater N.Y. Blood Program* (80 NY2d 219 [1992]), the Court adopted the Appellate Division Second Department's three-prong formulation of the rule that it set forth in *Brock v Bua* (83 AD2d 61 [2d Dept 1981]), to wit, that a claim against a new defendant will relate back if: (1) it arises out of the same occurrence or transaction as the initial claim; (2) the new party is united in interest with the initial defendant; and (3) the new party "knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Brock v*

*Bua*, 83 AD2d at 69. Subsequently, in *Buran v Coupal* (87 NY2d 173 [1995]), the Court held that a plaintiff's mistake did not need to be excusable in order to allow the plaintiff the benefit of CPLR 203 (f).

Third-party defendants argue that plaintiffs' proposed amended complaint cannot relate back, because third-party defendants are not united in interest with defendants, and that, inasmuch as plaintiffs had all the information that they needed in order to assert their claims against the third-party defendants prior to the expiration of the three-year limitations period, their failure timely to amend their complaint was due not to any mistake on their part but to their negligent dilatoriness.

Disposition of the instant motion, however, is governed by *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 475 [1985]), in which the Court held that a plaintiff can amend his or her complaint to assert a direct claim against a third-party defendant, absent prejudice to that defendant, if, as here, the third-party complaint was served within the applicable limitations period "where the third-party complaint and the amended complaint are based on the same transaction or occurrence." It should go without saying that a defendant's exposure to greater liability does not constitute prejudice. *Koch v Acker, Merrall, Condit Co.*, 114 AD3d 596, 597 (1st Dept 2014). Thus, where a proposed new defendant is already a party to the action and has "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended complaint" (CPLR 203 [f]), the three-step inquiry adopted by the *Mondello* Court does not apply. *US Bank N.A. v Gestetner*, 103 AD3d 962, 964-965 (3d Dept 2013) (citing *Duffy* and allowing claims of which the original pleading gave notice to relate back, as to a defendant who intervened in the action). The court notes that both in *US Bank* and in

*Fitzpatrick v City of New York* (185 Misc 2d 79, 82 [Sup Ct, NY County 2000]), the courts held that only those claims of which the proposed new defendants had notice could relate back. Here, third-party defendants do not argue that they will be prejudiced if plaintiffs' motion is granted, and it is indisputable that they had notice of the claims sought to be interposed, as well as notice of the occurrence upon which those claims are based.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs George Holt and Georgia Holt is granted and the supplemental summons and amended verified complaint in the form annexed to the motion papers will be deemed served upon service on the third-party defendants of a copy of this order with notice of entry; and it is further

ORDERED that College Point Grocery Owners, LLC, 1907 Ventures, LLC, 1411 Ventures, LLC, and AAG Management, Inc. shall answer the amended complaint or otherwise respond to it within 20 days of said service.

Dated: May 12, 2014

ENTER:



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Ellen M. Coin, A.J.S.C.