SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

William McCann

-v-

HLT NY Hilton, LLC, et al.

INDEX NO. 150888/14

MOTION DATE

MOTION SEQ. NO. 001

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

In this personal injury action, defendant HLT NY Hilton, LLC ("HLT") moves to consolidate for discovery and joint trial, an action previously commenced in Supreme Court, Queens County under Index No. 4689/2012 entitled *William McCann v Hilton Hotels Corporation*, with the instant action under the instant index number, and upon consolidation, to amend the caption to reflect the combined actions. HLT also seeks, *via* cross-motion, leave to amend its third party complaints filed in the Queens action to correct and/or substitute the party name, "Hilton New York Towers" as third party plaintiff with "HLT NY Hilton, LLC."

By separate cross-motion, third party defendant in the Queens action, Freeman Decorating Services, Inc. ("Freeman") moves to dismiss the proposed third party complaint.

Motions

In support of its motion to consolidate, HLT argues that the consolidation is warranted since both actions arise out of the same accident, in which plaintiff was allegedly injured while working for Freeman, his employer. Since the Queens action was stayed for parties to complete discovery, and independent and medical exams are still outstanding in such action, there is no arguable prejudice to the consolidation of both actions.

Freeman does not oppose consolidation, or the selection of New York county as the forum for the consolidated action. However, Freeman opposes the request to amend the caption to reflect the combined actions, since the third party plaintiff in the Queens action - "Hilton New York Towers" ("Towers") - is not a legally cognizable entity, and Towers never sought to intervene or assert claims in the Queens action. Towers, an unnamed separate entity, neither was sued in the Queens action nor answered that action, and alleges to be a foreign corporation authorized to do business in New York, even though a search of New York state records does not

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

Dated: ____ ____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
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reveal any such entity incorporated or authorized to do such business. Instead, the records show that HLT is a foreign company registered in Delaware, and that "Hotels Corp." is a defunct former name of Hilton Worldwide, also a foreign corporation. And, if Towers is a trade name, trade names have no jural existence. Thus, if Towers does exist, it was required to seek leave to intervene in the Queens action, which it failed to do. Indeed, Towers is not a proper party to any action, as it did not exist and thus, cannot have a genuine controversy. And, Towers' lack of standing to pursue claims in the Queens action deprives the Court of subject matter jurisdiction, warranting dismissal of the third party complaint pursuant to CPLR 3211(a)(2). Thus, the unilaterally altered caption should not be adopted by the Court upon consolidation. The original caption in the Queens action should be retained or be deemed to be amended to reflect only that HLT is an appropriate defendant, and the third party complaint against Freeman should be dismissed because under no circumstances is Towers a proper third party plaintiff.

In response, HLT cross moves to amend and substitute "Hilton New York Towers" with "HLT NY Hilton LLC," contending that HLT recently discovered that the incorrect name was improperly entered from a name within counsel's office computer system which was inadvertently linked to the instant matter. The action was always against HLT, and any resulting third party action could only be brought by HLT. Although this can be considered a correction, HLT sought leave to amend to ensure compliance with the CPLR. There is no prejudice to the third party defendants in the Queens action, who have been involved in all discovery to date, including depositions of HLT and Freeman, and there is no surprise to these parties that HLT would seek the instant correction. HLT asserts that it would be premature to grant Freeman's cross-motion to dismiss. And, while HLT could commence a new third party action against Freeman at any time, a correction of the pleadings serves judicial economy.

In response, Freeman opposes the amendment as untimely, and argues that HLT's motion seeks not only to correct its name, but also, make new factual allegations, which are contradicted by the evidence. The first third party complaint alleges that Hilton New York Towers is a foreign corporation, and the proposed third party complaint alleges that HLT is a Delaware corporation, which is an improper attempt to substitute a new party and business entity. The proposed third party complaint alleges that HLT owns the hotel located at 1335 6th Avenue, notwithstanding that a "Hilton" representative testified that at a deposition that the hotel was owned by Hilton Worldwide Inc. The proposed third party complaint also alleges that HLT entered into a contract with Freeman for the subject location; however, no party produced any contracts between Freeman and HLT despite demands for same. And, HLT admits that Hilton New York Towers does not exist and thus, the third party complaint is a nullity. In light of the discrepancies, the proposed third party complaint should be dismissed. Further, a new third party action could not be filed, since the preliminary conference order in the Queens action required all such actions to be filed by July 2013, or face severance if filed by a subsequent date. And, the defense costs HLT now seeks in the third party action would not be recoverable in a separate, new action.

If HLT's motion to amend is granted, costs should awarded Freeman for defending claims by a non-entity and opposing a motion arising from HLT's own errors.

In response, HLT contends that Freeman misunderstands that a clerical error was made and that there does not exist a separate Hilton New York Towers entity in this action. Plaintiff

commenced his action against HLT, and thus, only HLT could have sought third-party relief. To correct the secretarial and administrative error, HLT submits two proposed third party complaints against Freeman, as well as the contract between Hilton Hotels Corporation d/b/a Hilton New York and Freeman, which was previously exchanged. Further, a full reading of the deposition of Hilton's witness indicates that he was not sure as to the proper Hilton entity that owned the subject hotel. An affidavit from Ron Marron, of Hilton Worldwide, Inc. demonstrates that HLT was the owner of the subject hotel on January 30, 2011, when the alleged accident occurred, and that it is the current owner; Hilton Worldwide is the current owner of HLT, and wholly owned HLT on the date of the incident; and the "d/b/a of Hilton New York" contained within the contract submitted is also known as HLT. HLT also points out that Freeman does not oppose consolidation.

Discussion

It is undisputed that the instant New York County action arises out of the same transaction and/or occurrence as in the Queens County action (Hilton Motion 001, Aff. ¶16) and consolidation of both actions is unopposed. Therefore, the branch of the motion for consolidation under the instant New York action is granted.

As to HLT's cross motion to amend its third party action to substitute "Hilton New York Towers" with "HLT NY Hilton LLC," the request is granted.

It "is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party" (*Kocourek v Booz Allen Hamilton Inc.*, 925 NYS2d 51 [1st Dept 2011] citing CPLR 3025[b] and *Solomon Holding Corp. v Golia*, 55 A.D.3d 507, 868 N.Y.S.2d 612 [2008]). "Mere delay is insufficient to defeat a motion for leave to amend" (*Kocourek citing Sheppard v Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33, 34, 734 N.Y.S.2d 1 [2001]). "Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position' " (*Kocourek citing Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365, 841 N.Y.S.2d 277 [2007], *quoting Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 429 N.E.2d 90 [1981]). "[T]o conserve judicial resources, an examination of underlying merits of the proposed causes of action is warranted" *(Megaris Furs, Inc. v Gimble Bros., Inc.*, 172 AD2d 209 [1st Dept 1991]). Thus, a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Eighth Ave. Garage Corp. v H.K.L. Realty Corp. et al.*, 60 AD3d 404 [1st Dept 2009]; *Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], lv dismissed 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

The party "opposing a motion to amend a pleading must overcome a presumption of validity in the moving party's favor, and demonstrate that the facts alleged and relied upon in the moving papers are obviously unreliable or insufficient to support the amendment" (*Peach Parking Corp. v 346 West 40th Street, LLC*, 42 AD3d 82, 86 [1st Dept 2007], *citing Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 [1st Dept 1989]). However, those facts do not need to be proved at this juncture (*Daniels v Empire-Orr* at 371).

Here, the record demonstrates that plaintiff commenced two actions as a result of an

accident occurring at the Hilton Hotel located at 1335 Avenue, New York, New York (Queens action complaint, ¶ Fifth), one naming "Hilton Hotels Corporation" and one later naming "HLT NY Hilton." In the first, Queens action, HLT filed an Answer on behalf of "HLT NY Hilton LLC i/s/a Hilton Hotels Corporation" and admitted to owning the hotel at the above location. Thus, HLT always admitted ownership of the accident location, and represented that it was answering on behalf of the defendant identified by plaintiff as Hilton Hotels Corporation.

However, a subsequent third party complaint was filed under the Queens action index number, with "*Hilton New York Towers*" printed as the named defendant in the main action (and as the third party plaintiff). The Court finds that HLT's submissions demonstrate that there was an apparent, inadvertent error in the preparation of the third party pleading, given that plaintiff never brought suit against "Hilton New York Towers." That the third party complaint alleges that "Hilton New York Towers" was a foreign corporation, authorized to do business in New York, is insufficient to deny HLT's motion, given that the contract upon which the third party action is based identifies Hilton Hotel Corporation (the party initially sued by plaintiff) "d/b/a Hilton New York" (which according to HLT, is also known as HLT). Therefore, it cannot be said the proposed amended third party complaint correcting the named defendant in the Queens action to reflect HLT, and its business status, lacks merit. And, the deposition of Hilton's witness is unclear as to the ownership of the hotel at issue. In this regard, HLT's reply submissions clarify that HLT is the owner of the subject location, and was the owner of the subject location at the time of the alleged accident. Thus, since the inclusion of Towers was an inadvertent error, leave to intervene in the Queens action was not required; there was no intent for third party claims to be made by Tower, which was not even a named defendant in the main Queens action.

There is no showing of any prejudice in permitting the amendment sough. Further, Freeman's argument concerning the lack of subject matter jurisdiction lacks merit.

And, in light of HLT's entitlement to the relief it seeks, Freeman's request for costs is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that defendant HLT NY Hilton, LLC's motion to consolidate for discovery and joint trial, an action previously commenced in Supreme Court, Queens County under Index No. 4689/2012 entitled *William McCann v Hilton Hotels Corporation*, with the instant action under the instant index number, is granted, without opposition; and it is further

ORDERED that HLT NY Hilton, LLC's cross motion for leave to amend its third party complaints filed in the Queens action to correct and/or substitute the party name, "Hilton New York Towers" as defendant and third party plaintiff with "HLT NY Hilton, LLC." in the form attached to it reply papers, is granted; and it is further

ORDERED that the cross motion by third party defendant in the Queens action, Freeman Decorating Services, Inc. to dismiss the proposed third party complaint is denied; and it is further

ORDERED that the consolidated action shall bear the caption appearing on the page attached hereto; and it is further

ORDERED that the remaining pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that the upon receipt of a copy of this Order, the Clerk of the Supreme Court Queens County, is directed to transfer the papers on file in the action entitled *William McCann v Hilton Hotels Corporation*, Index No. 4689/2012, to the Clerk of the Supreme Court, County of New York upon service of a copy of this order and payment of appropriate fees, if any; and it is further

ORDERED that counsel shall appear for a Preliminary Conference before Justice Carol Robinson Edmead, Supreme Court, New York County, Part 35 60 Centre Street, Room 438 on Tuesday, August 5, 2014 at 2:30 p.m.; and it is further

ORDERED that upon receipt of a copy of this order, the Trial Support Office and the County Clerk shall consolidate the papers in the actions hereby consolidated and shall mark the records to reflect the consolidation; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

This constitutes the decision and order of the Court.

DATED: 6/2/14

J.S.C.

HON. CAROL EDMEAD

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE