

Martin v Venetis Enters., Inc.
2015 NY Slip Op 32077(U)
September 18, 2015
Supreme Court, New York County
Docket Number: 108979/2011
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

EA
9/22/15
E

PRESENT: **HON. EILEEN A. RAKOWER**

Justice

PART 15

Index Number : 108979/2011

MARTIN, IRIS

vs

VENETIS ENTERPRISES

Sequence Number : 002

AMEND CAPTION/PARTIES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2

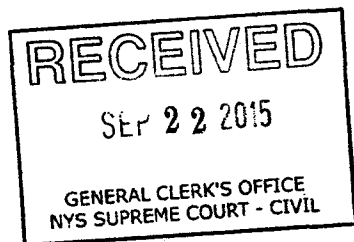
Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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



FILED
SEP 23 2015

COUNTY CLERK'S OFFICE

Dated: 9/18/15

SEP 18 2015

 J.S.C.

HON. EILEEN A. RAKOWER

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
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
IRIS MARTIN,

Plaintiff,

- v -

Index No.
108979/2011

**DECISION
and ORDER**

Mot. Seq. #002

VENETIS ENTERPRISES, INC. and RDS PHARMACY,
INC., d/b/a CENTURY PHARMACY,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

FILED

SEP 23 2015

Plaintiff, Iris Martin ("Plaintiff"), brings this action for personal injuries sustained in a slip and fall accident (the "Accident") on January 4, 2011, on the sidewalk located in front of the residential building located at 225 Madison Street, New York, New York (the "Premises"). Plaintiff's complaint names defendant, Venetis Enterprises, Inc. ("Venetis Enterprises"), as owner of the Premises.

Plaintiff commenced this action on August 4, 2011, by summons and complaint. Plaintiff previously moved for, and obtained, a default judgment against Venetis Enterprises, by Order dated December 17, 2012 (the "Default Judgment").

Plaintiff now moves for an Order, pursuant to CPLR § 3026, granting Plaintiff leave to amend Plaintiff's complaint to add proposed defendants, Elefterios Venetis ("Mr. Venetis") and E.S. Venetis Properties, Inc. ("E.S. Venetis"), as defendants in this case and amending the caption to reflect the change in parties. In support, Plaintiff submits: the attorney affirmation of Steven J. Labell ("Labell"), dated April 22, 2015; copies of Plaintiff's pleadings herein; a copy of the New York State Division of Corporations search results for Venetis Enterprises; copies of certain correspondence exchanged between the parties; a copy of the Default Judgment; a copy of the E-law printout for this case; a copy of the deed for the Premises (the "Deed"); and, a copy of the New York State Division of Corporations search results for E.S. Venetis.

No opposition is submitted.

CPLR § 3025 permits a party to amend or supplement its pleading “by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties.” (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such “leave shall be freely given upon such terms as may be just including the granting of costs and continuances.” (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325 [1st Dep’t 1998]). In addition, pursuant CPLR § 1003, parties may be added at any stage of the action by leave of court. (CPLR § 1003).

Where the Statute of Limitations period has expired, a plaintiff may add a new party or claim in an amended pleading pursuant to the relation back doctrine. (*Buran v. Coupal*, 87 N.Y.2d 173, 177 [1995]; CPLR § 203[c]). This doctrine allows claims asserted against one defendant to “relate back” to claims previously asserted against another defendant for purposes of the Statute of Limitations if three criteria are met:

(1) both claims arose out of 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 he will not be prejudiced in maintaining his defense on the merits; 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.

(*Buran v. Coupal*, 87 N.Y.2d 173, 178 [1995]). However, “[w]hen a plaintiff intentionally decides not to assert a claim against a party . . . , there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired.” (*27th St. Block Ass’n v. Dormitory Auth.*, 302 A.D.2d 155, 164 [1st Dep’t 2002] *quoting Buran v. Coupal*, 87 N.Y.2d 173, 181 [1995]).

Plaintiff seeks leave to amend the complaint to add Mr. Venetis and E.S. Venetis as additional defendants herein on the basis that Plaintiff’s claims against the proposed new defendants relate back to Plaintiff’s claims against Venetis Enterprises. In the attorney affirmation of Labell, Labell affirms that Venetis Enterprises, “was the active entity listed on the New York State Division of Corporations as the owner of the [Premises].” (Labell Affirm. ¶ 4). Labell affirms

that Plaintiff obtained a default judgment against Venetis Enterprises, by Order dated December 17, 2012, and that, “an inquest was held on or about January 20, 2015 . . . wherein an award in the amount of three hundred thousand dollars (\$300,000.00) was made for plaintiff’s damages.” (*Id.* ¶ 11).

Labell affirms that, “[t]hereafter, an attorney . . . contacted [Labell’s] office on behalf of Mr. Venetis and advised that [Venetis Enterprises] is not the legal owner of the subject property.” (*Id.* ¶ 12). Labell affirms that, although Mr. Venetis was aware of the instant litigation and had previously corresponded with Plaintiff on Venetis Enterprises’ behalf, (*Id.* ¶¶ 5, 8, 9), “[t]his was the first time this crucial information was disclosed, despite Mr. Venetis being aware from the onset.” (*Id.* ¶ 12).

However, Labell further affirms:

Your affirmant notes that at the onset plaintiff’s attorney properly conducted an investigation as to the owner of the subject property. The deed indicated that the owner of the subject property was E.S. Venetis Properties, Inc. . . . When your affirmant’s office conducted a search of the New York State Division of Corporations, the entity, E.S. Venetis Properties, Inc. was “inactive” due to Dissolution by Proclamation. In fact, this entity was “inactive” from 1993 through February of 2015. Only recently, and after a decision was rendered, E.S. Venetis Properties, Inc. was activated.

(*Id.* ¶ 14). In addition, Labell affirms:

Your affirmant notes that plaintiff’s attorney properly conducted a search of the Deed of the subject property and the New York State Division of Corporations in order to determine the correct party to sue when Weiser & Associates was first retained. . . . [Venetis Enterprises] was listed as the duly registered active corporation owning the [Premises] . . . In fact, not only was the location for service of process registered at that address, but the Chairman and Principal, . . . [Mr. Venetis], was also listed at that address, as well as the Principal Executive Office being listed at the same address. . . . Given the fact that . . . [E.S. Venetis]

was “inactive” it was apparent that the correct entity was [Venetis Enterprises].

(*Id.* ¶ 15).

Here, Plaintiff’s attorney affirmation unequivocally states that Plaintiff reviewed the Deed identifying E.S. Venetis as the legal owner of the Premises, “at the onset” of this litigation. (*Id.* ¶ 14). Nevertheless, Plaintiff chose not to name E.S. Venetis as a party at the onset of this case. Instead, Plaintiff commenced this action against Venetis Enterprises, alleging that “at all times hereinafter mentioned, defendant, VENETIS ENTERPRISES INC., owned the premises and appurtenances and fixtures thereto, located at 225 Madison Avenue, County of New York, City and State of New York.” (Verified Compl. ¶ 4). On that basis, Plaintiff obtained a default judgment against Venetis Enterprises, dated December 12, 2012 and filed on December 17, 2012. Plaintiff’s attorney affirmation also clearly states that Plaintiff was aware of the existence and identity of Mr. Venetis, and indeed communicated with Mr. Venetis “on several occasions” regarding Plaintiff’s personal injury action. (*See, e.g.*, Labell Affirm. ¶¶ 8-10).

Even assuming that Plaintiff meets the first and second prongs of the relation back test—i.e., that Plaintiff’s current claims against E.S. Venetis and Mr. Venetis arose out of the Accident and that E.S. Venetis and Mr. Venetis are “united in interest” with Venetis Enterprises—Plaintiff fails to satisfy the third prong of the relation back test. As Plaintiff plainly was aware of the Deed listing E.S. Venetis as the legal owner of the Premises at the time of the original pleading, Plaintiff simply cannot demonstrate that, but for an excusable mistake by Plaintiff as to the identity of the proper parties, Plaintiff’s personal injury action would have been brought against E.S. Venetis. Nor does Plaintiff establish that Plaintiff’s personal injury action would have been brought against Mr. Venetis, with whom Plaintiff was in contact throughout the pendency of this case, but for an excusable mistake as to the identity of the proper parties. Rather, Plaintiff’s failure to join E.S. Venetis or Mr. Venetis “was a mistake of law, ‘which is not the type of mistake contemplated by the relation-back doctrine’”. (*27th St. Block Ass’n*, 302 A.D.2d at 165 *quoting Brucha Mortg. Bankers Corp. v. Commissioner of Labor*, 266 A.D.2d 211 [2d Dep’t 1999]).

Furthermore, Plaintiff does not provide an amended pleading in the proposed form annexed to Plaintiff’s moving papers as required under CPLR § 3025(b). Accordingly, Plaintiff’s motion to amend the complaint to add proposed defendants, Mr. Venetis and E.S. Venetis, as additional defendants in this case fails.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion is denied.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: September 18, 2015

SEP 18 2015


EILEEN A. RAKOWER, J.S.C.

FILED

SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK